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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 283.

THE UNITED STATES, APPELLANT,

vs.

LEWIS E. BROWN.

No. 284.

LEWIS E. BROWN, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED MAY 3, 1906.

(20240 AND 20241.)

SUPREME COURT OF THE UNITED STATES.

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1 In the Court of Claims.

LEWIS E. BROWN
vs.
UNITED STATES. } No. 23129.

I. *Petition—Filed December 17, 1902.*

The petition of Lewis E. Brown shows as follows:

1. Heretofore, to wit, on the 7th day of July, 1898, the petitioner, by the name of Louis E. Brown, was by the President of the United States, by and with the advice and consent of the Senate, duly appointed and commissioned first lieutenant, 9th Regiment Volunteer Infantry, in the military service of the United States, and then entered upon and thereafter continued to discharge the duties of his office under said commission within the United States and in the island of Cuba until February 15th, 1899, after which date the further performance by him of his said duties has been prevented by his superior officers.

He then returned from Cuba, where he had been with his command ever since, on or about the 1st day of August, 1898, to the United States, and ever since his said return, with the aid of counsel employed by him, and exerting all the means in his power, he has been constantly engaged in the effort to secure his restoration to duty under his said commission and, failing in that, to secure an honorable discharge from the military service aforesaid. He first applied by letter, dated March 30th, 1899, to the Secretary of War to be restored to duty, which application failed.

Thereupon he applied by letter, dated May 7, 1900, to the Secre-
2 tary of War for an honorable discharge from the service aforesaid, but this effort also failed. He thereupon instituted mandamus proceedings in the supreme court of the District of Columbia to secure such discharge, but he also failed in that effort. He has been at all times since February 15th, 1899, ready, willing, and able to perform the duties of his rank under said commission, of which fact the Secretary of War has ever been well aware.

The Auditor allowed his said application for pay to and including February 17th, 1899, but disallowed his application as to extra pay during the period of the petitioner's service in Cuba for traveling allowances and for pay after February 17th, 1899.

2. The action of the War Department and Auditor in the premises is based upon a certain paper writing on file in the War Department, purporting to be the record of proceedings of a court-martial. The matters appearing in said paper writing are substantially as follows: That on November 3d, 1898, by command of Gen. Leonard Wood, commanding the Department of Santiago, a general court-martial was appointed to meet at San Luis, Cuba, and certain officers were detailed to compose the court, including among others, Lieut. Col. H. Y. Grubbs, 2d U. S. Vol. Inf.; that on November 11th, 1898, the court met at the place so appointed and proceeded to the trial of this petitioner upon the charge of conduct unbecoming an officer and a gentleman in violation of the 61st article of war; that the petitioner was then and there before said court arraigned upon said charge and the specifications thereof, and pleaded to both not

guilty; that thereupon the court proceeded with the trial of this petitioner and found and adjudged the petitioner of the charge and also of the specification aforesaid, not guilty, and did fully acquit him, and certified said finding and acquittal to said General Wood, and the court thereupon adjourned sine die; that several weeks thereafter, to wit, December 6th, 1898, without notice to this petitioner and without warrant of law,
3 the said court unlawfully caused to be added to said pretended record a statement that it did then revoke its former findings and did then find this petitioner guilty of said charge and did then sentence him to be dismissed from the service.

This petitioner is advised by counsel and believes that for the reasons hereinafter set forth and for other reasons the pretended sentence, and in fact all the proceedings aforesaid of the so-called court, are and ever were illegal and wholly void.

3. It is a fact, but was not known to this petitioner until on or about May 30th, 1902, that one of the officers so detailed to compose said court, and who served as a member and as president thereof and participated in all said proceedings thereof, by the name and title of Lieut. Col. H. Y. Grubbs, 2d U. S. Vol. Inf., was in fact at the time of said detail and throughout all said proceedings an officer of the Regular Army of the United States, holding as such a commission of 1st lieut. of infantry, and by reason of the 77th article of war incompetent to sit on said court-martial for the trial of this petitioner, who was not an officer of the Regular Army. This petitioner therefore charges that all of the proceedings of said pretended court in his case are and ever were illegal, null, and void.

4. If this petitioner is mistaken in his assertion that the said pretended court was without jurisdiction to try him as herein set forth, then and in that event the finding of not guilty and acquittal aforesaid were final and conclusive, and the pretended finding of guilty and sentence aforesaid are and ever were illegal, null, and void.

5. This petitioner is advised by counsel, and believes, that without reference to the question as to whether or not the finding of not guilty and acquittal was conclusive, the said alleged finding of guilty and sentence were unlawful, null, and void, because Gen. Wood's order of December 1st, 1898, returning the record of the court for reconsideration did not point out defects in the record, as required by par. 957
4 of the Army Regulations of 1895, then in force, and also because the said order does not state nor does it otherwise appear that the record of the court at that time exhibited error in preparation or seemingly erroneous conclusions, and also because said par. 957 does not purport nor should it be construed to authorize the reviewing authority to recommit the case to a court-martial for reconsideration of findings of not guilty, whereby defendant is fully acquitted of every offence charged against him after a trial on the merits.

6. This petitioner is also advised by counsel, and believes, that even if the said proceedings and sentence were lawful, which he denies, yet that the attempted dismissal of this petitioner from the service without the approval of the President of the United States of said sentence was in violation of the 106th article of war, and illegal, null, and void, because hostilities between the United States and Spain were suspended

on August 12th, 1898, prior to the date of the alleged offence, and the treaty of peace between the United States and Spain was signed December 10th, 1898, the ratification of which treaty was afterwards duly made and proclaimed by the President, and according to the true intent and meaning of said article 106, the attempt to carry said sentence into execution was during a time of peace.

7. This petitioner is unable to state the exact amounts due him by reason of the premises, but he is informed and believes and so avers, that the same are as follows, to wit, $5,750 for his pay as first lieutenant aforesaid ever since the 17th day of February, 1899, at the rate of $1,500 per annum, and also $375 for three months' extra pay as such first lieutenant under the act of Congress approved January 12th, 1899, chapter 46 (30 S. L., 784), and also $500 for mileage and traveling allowances for travel from San Luis, Cuba, by way of New York City, to the city of New Orleans, Louisiana, where he was mustered into said service, or else to the city of Houston, Texas, which was the place of his residence at the time of his said appointment; amounting in all to the sum of six thousand six hundred and twenty-five dollars ($6,625), which he now claims.

8. This petitioner has not assigned or transferred his said claim, or any part thereof, or any interest therein, but is justly entitled to the amount thereof from the United States, after allowing all just credits and set-offs, as he is informed and believes.

9. The petitioner is a citizen of the United States, and has at all times borne allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and he believes the facts as stated in this petition to be true.

He prays judgment against the United States of America by reason of the premises for the sum of six thousand six hundred and twenty-five dollars ($6,625), as aforesaid.

LEWIS E. BROWN.

LORENZO A. BAILEY,
DUDLEY & MICHENER,
Attorneys.

DISTRICT OF COLUMBIA, *ss:*

I, Lewis E. Brown, do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those therein stated upon information and belief I believe to be true.

LEWIS E. BROWN.

Subscribed and sworn to before me this 15th day of December, 1902.

[SEAL.]

IVAN HEIDEMAN,
Notary Public in and for said District.

6 II. *Traverse—Filed February 8, 1905.*

In the Court of Claims of the United States. Term, A. D. 1904–1905.

LEWIS E. BROWN
vs.
THE UNITED STATES. } No. 23129.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

III. This cause was argued February 8, 1905, by Mr. Lorenzo A. Bailey for the claimant and by Mr. F. W. Collins for the defendants, and submitted.

On the 20th day of March, 1905, the court filed its findings of fact, and judgment was entered for claimant in the sum of four hundred and four dollars and twelve cents. The court also filed the following opinion:

NOTT, Ch. J., delivered the opinion of the court.

This case comes into court with a record which is not creditable to the administration of military justice.

1. First, it appears that the claimant, a lieutenant of volunteers, was tried by a court-martial of five members (the minimum number), the president of which was an officer in the Regular Army, notwithstanding the seventy-seventh article of war, which provides that "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces." Without this officer the court consisted of less than the minimum number, and there could, consequently, be no court and no conviction.

2. It also appears that the court found the officer not guilty of the charge and specification upon which he had been tried.

3. It also appears that the record of the court-martial proceeding was transmitted to the commanding officer who convened the court, and was by him indorsed: "Returned for reconsideration." Thereupon the court-martial immediately—that is to say, upon the same day—and with no additional evidence before it, found the officer guilty of the charge and specification, and sentenced him to be dismissed from the service. This sentence was approved and carried out.

4. It also appears that the record of the court-martial upon which the case was considered by the commanding general was attacked collaterally, it being shown *aliunde* the record that the testimony of a witness, who was summoned, sworn, and examined before the court as a witness for the accused, and whose testimony tended to prove the accused innocent of the charge and specification, was wholly omitted from the record.

7 5. It finally appears that the charge was "conduct unbecoming an officer and a gentleman," and the specification was that the accused "did gamble with enlisted men at camp near San Luis, Cuba, on or about the 11th day of October, 1898." "Conduct unbecoming an

officer and a gentleman" is a military offense not defined and not definable, but it involves necessarily the element of turpitude or dishonor. It ranks next on the roll of dishonor to cowardice. There is no latitude of discretion as to the punishment, which must always be, upon conviction, dismissal from the service. The specification, "did gamble with enlisted men" on one occasion, "the 11th day of October, 1898," is a mere conclusion of law and not a specification of facts. To pay 25 cents for a ticket in a raffle would be gambling; it might be conduct prejudicial to good order and military discipline, but it would be too absurd for argument to class it as "conduct unbecoming an officer and a gentleman," as involving turpitude or dishonor, or as rendering a man unfit to associate with honorable men and to continue to do duty in the Army.

The first objection raised to the conviction is that above set forth, that one of the members of the court-martial was an officer of the Regular Army, and that without him there was not a sufficient number of members present to constitute a court.

To this the defendant's counsel makes two replies: First, that the officer was asked if he had any objection to any member of the court, and he answered "no;" second, that that member of the court was at the time absent from the Regular Army on leave and serving as a lieutenant-colonel of volunteers.

As against the first of these replies the counsel for the claimant contends that the member of the court came into the court-martial in the guise of an officer of volunteers; that the fact of his being in the Regular Army was unknown to the officer on trial, and that the waiver of the officer of personal objection to all members of the court could not make a member competent who by statute is expressly declared "not competent."

As to the second ground taken by the defendant's counsel, viz, that the relations of the member of the court with the Regular Army were for the time being suspended, it may be conceded that, if the purpose of the statute was administrative, if the object was to save the more valuable time of Regular Army officers, if there were two systems of law applicable to the regular and volunteer forces, etc., the suspension of an officer's relations with the Regular Army might take the case out of the statute. But the purpose of the statute undoubtedly was to obviate a prejudice which existed in the minds of volunteers against Regular Army officers—a belief that such officers were prejudiced against volunteers, that they administered discipline and punishment with a severity that amounted to injustice. The language of the statute is too imperative to admit of evasion: "Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces." It admits of but one interpretation and of no exception. The president of the court was a lieutenant in the Regular Army. While he was temporarily doing duty as a lieutenant-colonel of the volunteer forces he was promoted in the Regular Army; and the fact that he was also doing duty as an officer in a volunteer regiment does not authorize the court to say that he was not an officer of Regular Army. The court is of the opinion that the competency of this member of the court could not be conferred by the waiver of personal objections, and that he was an officer of the Regular Army within the intent of the statute.

The other questions in the case have been argued with most praiseworthy care and elaboration. Some of them are of great importance, but in view of the fact that the proceedings were void ab initio, that there was in fact no court present competent to try the claimant for his alleged offense, it is inadvisable that this court proceed further with the case.

The claimant seeks to recover pay from the time he was dismissed under the sentence of the court-martial to the present time. He grounds this supposed right partly on the fact that he applied to the War Department for an honorable discharge, and that it was refused. But when he so applied he had been dismissed from the Army, and the ground of his dismissal appearing on the record of the Department as honorable or dishonorable would not affect his right to recover the pay of which he had been illegally deprived. It seems plain to the court that when the regiment, with all of its officers and men, was mustered out of the service the muster-out was the dissolution of the regiment and of every office in and connected with it. From that time there was no office for the claimant to hold and no salary to which he could be entitled. The recovery, therefore, must be limited to a recovery of the officer's pay from and including Feburary 18, 1899, up to the time of the final muster out of the regiment, May 25, 1899, both inclusive, amounting to $404.12.

8 IV. *Order—Filed March 12, 1906.*

On the 29th day of January, 1906, the case was reargued and resubmitted and on the 12th day of March, 1906, the court filed the following

ORDER:

It is ordered by the court that the claimant's motion for a new trial be allowed; that the judgment heretofore rendered be vacated and set aside and the findings of fact be withdrawn; and that new findings of fact and conclusions of law be this day filed, ordering judgment for claimant in the sum of $658.33.

The opinion to stand as rendered, except as to change of figures in amount of judgment.

BY THE COURT.

Filed March 12, 1906.

9 V. *Findings of fact and conclusion of law—Filed March 12, 1906.*

LEWIS E. BROWN
vs.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Company I of the Ninth United States Volunteer Infantry was organized in the month of June, 1898, at Houston, Tex., whence it proceeded

to New Orleans, La., where it arrived July 2, 1898, and was there mustered into the service of the United States on July 3, 1898, and thereafter served in Cuba, beyond the limits of the United States.

The claimant, Lewis E. Brown, joined said company June 25, 1898, at Houston, Tex., where he then resided; was appointed, by the name of Louis E. Brown, first lieutenant of said company June 29, 1898; received and accepted July 11, 1898, at New Orleans, his commission, dated July 7, 1898, as such first lieutenant, and served as such with his company under said commission until February 17, 1899, within, and also in Cuba without, the limits of the United States.

II.

While said company was serving in Cuba, in the military department of Santiago, the following order was issued:

"Proceedings of a general court-martial which convened at San Luis, Cuba, pursuant to the following order:

"Special Orders, No. 70. } HEADQUARTERS DEPARTMENT OF SANTIAGO, *Santiago de Cuba, November 3d, 1898.*

[Extract.]

"4. A general court-martial is hereby appointed to meet at San Luis, Cuba, at ten o'clock a. m., Monday, Nov. 7th, 1898, or as soon thereafter as practicable, for the trial of such officers as may be properly brought before it.

"DETAIL FOR THE COURT.

"Colonel C. J. Crane, 9th U. S. V. I.
"Lt. Col. H. Y. Grubbs, 2d U. S. V. I.
"Major H. N. Swain, 2d U. S. V. I.
"Major G. W. Ford, 23d Kansas Vol. Inf.
"Capt. M. S. Swain, 2d U. S. V. I.
"Capt. F. J. Looney, 2d U. S. V. I.
"Capt. R. M. Nolen, 9th U. S. V. I.
"Capt. C. A. Winders, 9th U. S. V. I.
"Capt. J. L. Waller, 23d Kansas Vol. Inf.
"Capt. T. R. Van Pelt, 8th Ill. Vol. Inf.
"1st Lieut. Allen Sholars, 2d U. S. V. I., appointed judge-advocate.
"A greater number of officers can not be assembled without manifest injury to the service.
"Immediate example requiring it, the court will sit without regard to hours.
"The quartermaster's department will furnish the necessary transportation.
"By command of Brigadier-General Wood.

"JOHN H. BEACON,
"Lt. Col. & A. A. G., U. S. V., Adjutant-General."

10 At 2 o'clock p. m., November 11, 1898, the court met pursuant to said order, except that four members of the court were absent, viz, Colonel Crane, Major Swain, and Captains Looney and Nolen.

The said Brown was then brought before the court and said order was read to him, and he was asked if he objected to being tried by any member present named therein, to which he replied that he objected to Capt. C. A. Winders, Ninth United States Volunteer Infantry, on the ground that said Captain Winders was the officer preferring the charge and a witness; which objection was sustained by the court, and Captain Winders withdrew.

The said Brown was then asked if he objected to any other member present, to which he replied in the negative.

The remaining five members of the court, consisting of Lieutenant-Colonel Grubbs, Major Ford, and Captains Swain, Waller, and Van Pelt, and the judge-advocate, First Lieutenant Sholars, were then sworn, and before the court which was so organized the said Brown was thereupon arraigned and tried on the charge of "Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war." The specification under this charge was: "In that the said First Lieutenant Louis E. Brown, Company I, 9th U. S. Vol. Inft., did gamble with enlisted men of Co. I, 9th U. S. V. Inft. This at camp near San Luis, Cuba, on or about the eleventh day of October, A. D. 1898." To the charge and specification the accused pleaded not guilty.

Witnesses were produced, sworn, and examined for the prosecution and for the accused, respectively, whereupon the case was submitted. The accused and the judge-advocate withdrew, the court was closed, and found the accused of the charge and of the specification not guilty, and acquitted him. The court then adjourned sine die, and the record was transmitted to General Wood, by whose order the court had been convened.

III.

December 6, 1898, the court reconvened at San Luis pursuant to the following indorsement upon the record:

"HEADQUARTERS DEPARTMENT OF SANTIAGO,
"*Santa, Dec. 1st, 1898.*

"Respectfully returned to G. C. M. convened at San Luis, S. O. 70, p. 4, these headquarters, for reconsideration.

"By command of Brig. Genl. Wood:

"JOHN H. BEACOM,
"*Lt. Col. Vol., A. A. G., Ad't Gen'l.*"

The said indorsement was then read to the court; whereupon the court revoked its former findings and found the accused of the specification and also of the charge guilty, and sentenced him to be dismissed the service; whereupon the court again adjourned sine die.

The accused was not present at said proceedings had on December 6, 1898, and had no notice or knowledge thereof.

December 24, 1898, General Wood approved the proceedings, findings, and sentence of the court as recorded, and forwarded such record to the War Department for the action of the President; but the same was, on January 12, 1899, returned to General Wood by the War Department, with the statement of the Judge-Advocate-General "that the one hundred and sixth article of war only relates to time of peace, and that the

state of war still continues;" whereupon the following order was made and indorsed on the record:

"HEADQUARTERS DEPARTMENT OF SANTIAGO,
"*Santiago de Cuba, Feb. 15th, 1899.*

"The sentence in the foregoing case of First Lieutenant Louis E. Brown, 9th United States Volunteer Infantry, will be executed to take effect on the seventeenth instant, on which date he will cease to be an officer of the Volunteer Army of the United States.

"LEONARD WOOD,
"*Major-General, U. S. V., Commanding.*"

IV.

May 7, 1900, the claimant duly applied for an honorable discharge as of May 25, 1899, and also for all pay, allowances, and other moneys due him to the date of such muster out, which applications were refused by the War Department.

V.

The claimant, as first lieutenant, has received pay at the rate of $1,500 per annum, as allowed by law during all the period commencing July 2, 1898, and ending February 17, 1899, excepting only the sum of $10 withheld from his pay for the month of October, 1898, and has received no other pay or allowances.

11 Claimant has not received the two months' extra pay provided for by the act of January 12, 1899.

VI.

Lieut. Col. H. Y. Grubbs, who served as president of said court-martial, was a cadet at the United States Military Academy from June 18, 1892, to June 12, 1896, when he was appointed second lieutenant, Eighteenth Infantry. An indefinite leave of absence from the Regular Army was granted him May 20, 1898, to enable him to accept a commission as lieutenant-colonel, Second United States Volunteer Infantry, and he was commissioned as such July 1, 1898, to rank from June 25, 1898, and accepted the commission July 8, 1898. He was mustered out and honorably discharged from the volunteer service as lieutenant-colonel, Second United States Volunteers, June 22, 1899. While on duty in the volunteer service he was promoted to be first lieutenant in the regular service September 16, 1898, and was assigned to the Sixth Infantry January 1, 1899.

The fact that Lieutenant-Colonel Grubbs was, at the time of the trial, a Regular Army officer was unknown to the claimant until May, 1902.

VII.

Ever since February 17, 1899, the claimant has been able, willing, and ready to perform the duties of his rank as first lieutenant.

Company I, of the Ninth United States Volunteer Infantry, and all the officers, noncommissioned officers, and enlisted men were mustered out May 25, 1899.

VIII.

The following indorsement appeared upon the back of the order of the commanding officer reconvening the court-martial, and was the first indorsement thereon:

"HEADQUARTERS DEPARTMENT OF SANTIAGO,
"OFFICE OF JUDGE-ADVOCATE,
"*December 1, 1898.*

"Respectfully returned to the adjutant-general of the department.

"The evidence in this case is conclusive as to the guilt of the accused. Four witnesses testify that they saw him gambling with enlisted men, while two witnesses, whose memories are faulty, testify negatively. The accused denies the allegation. It is recommended that the proceedings be returned to the court for reconsideration of its finding.

"H. R. BAILEY,
"*Captain, Fifth Infantry, Acting Judge Advocate.*"

It does not affirmatively appear that this indorsement was read to the court-martial.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover of and from the United States judgment for pay from Feb. 18 to May 25, 1899, both inclusive, amounting to four hundred and eight dollars and thirty-three cents ($408.33), and for two months' extra pay, amounting to two hundred and fifty dollars ($250), making a total sum of six hundred and fifty-eight dollars and thirty-three cents ($658.33).

BY THE COURT.

12 VI. *Final judgment of the court.*

LEWIS E. BROWN
vs.
THE UNITED STATES. } No. 23129.

At a Court of Claims held in the city of Washington on the 11th day of March, 1906, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, Lewis E. Brown, do have and recover of and from the United States the sum of six hundred and fifty-eight dollars and thirty-three cents.

$658\frac{33}{100}$.

BY THE COURT.

13 VII. *Application of the defendants for an allowance of appeal.*

LEWIS E. BROWN
vs.
THE UNITED STATES. } No. 23129.

From the judgment rendered in the above-entitled cause on the 12th day of March, 1906, in favor of the claimant, the defendants, by their

Attorney-General, on the 23d day of April, 1906, make application for and give notice of an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
Asst. Attorney-General.

Filed April 23, 1906.

Ordered, that this appeal be allowed as prayed for.

BY THE COURT.

April 23, 1906.

14 VIII. *Application of the claimant for and allowance of appeal.*

LEWIS E. BROWN
v.
THE UNITED STATES. } No. 23129.

From the judgment rendered in the above-entitled cause on the 12th day of March, 1906, the claimant, by his attorneys, on the 23d day of April, 1906, makes application for and gives notice of an appeal to the Supreme Court of the United States.

LORENZO A. BAILEY,
DUDLEY and MICHENER,
Attorneys for claimant

Filed April 23, 1906.

Ordered that this appeal be allowed as prayed for.

BY THE COURT.

April 23, 1906.

15 Court of Claims.

LEWIS E. BROWN
vs.
THE UNITED STATES. } No. 23129.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the opinion of the court, of the order of the court, of the findings of fact and conclusion of law, of the final judgment of the court, of the application of the defendants and of the claimant, respectively, for the allowance of appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 30th day of April, 1906.

[SEAL.]

JOHN RANDODPH,
Asst. Clerk Court of Claims.

16 (Indorsement on cover:) File No. 20240. Court of Claims. Term No. 283. The United States, appellant, vs. Lewis E. Brown. File No. 20241. Term No. 284. Lewis E. Brown, appellant, vs. The United States. Filed May 3d, 1906. File No. 20240 and 20241. Supreme Court U. S., office of the clerk. Received May 1, 1906.

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Office Supreme Court, U. S.
FILED.
APR 20 1907
JAMES H. McKENNEY,
CLERK

Nos. 283 and 284.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
LEWIS E. BROWN.

LEWIS E. BROWN, APPELLANT,
v.
THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

JOSIAH A. VAN ORSDEL,
Assistant Attorney-General.
GEORGE B. DAVIS,
Judge-Advocate-General.
FRANKLIN W. COLLINS,
Special Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT, v. LEWIS E. BROWN. } No. 283.

LEWIS E. BROWN, APPELLANT, v. THE UNITED STATES. } No. 284.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

I.

STATEMENT OF FACTS.

The above-mentioned Lewis E. Brown (who hereinafter will be referred to as the appellee) was, on the 7th day of July, 1898, duly appointed and commissioned first lieutenant of the Ninth Regiment Volunteer Infantry, in the service of the United States.

On November 11, 1898, he was tried by general court-martial, convened by order of Brigadier-General Wood, at San Luis, Cuba, upon the charge of "conduct unbecoming an officer and a gentleman"

in violation of the sixty-first article of war, the specification reciting that he had gambled with enlisted men of Company I, Ninth United States Volunteer Infantry, at camp near San Luis, Cuba, on or about the 11th day of October, 1898, and on said first-mentioned day he was by said court found not guilty of the charge and not guilty of the specification, and he was acquitted. Thereupon the court adjourned sine die. The record was thereupon transmitted to General Wood, and on December 6, 1898, was returned by him to the court for reconsideration, and on December 6, 1898, the court reconsidered its former findings and found the appellee guilty of the charge and of the specification, and sentenced him to be dismissed from the service. On December 24, 1898, the proceedings, findings, and sentence were approved by General Wood, and the record was duly forwarded for the action of the President; on January 12, 1899, the record was returned to General Wood and his attention challenged to the fact that the one hundred and sixth article of war, requiring the approval of the President, relates to time of peace and that the state of war still continued; on February 15, 1899, the sentence was ordered by the commanding officer to take effect on February 17, 1899, on which last-mentioned date the appellee would cease to be an officer of the Volunteer Army of the United States.

It further appears that the regiment to which appellee had been attached as an officer was mustered out by order of the President on the 25th day of May, 1899.

Upon the foregoing facts the Court of Claims decided, as a conclusion of law, that appellee was entitled to recover from the United States judgment for pay from February 18, 1899, up to the time of the final muster out of his regiment, or May 25, 1899, both inclusive, amounting to $404.12.

Subsequently the case was reargued and resubmitted to the Court of Claims on petitioner's motion to amend the findings of the court and for a new trial, and the Court of Claims allowed the petitioner's motion for a new trial and ordered the judgment theretofore rendered to be vacated and set aside and the findings of fact withdrawn and that new findings of fact and conclusions of law be filed, and increased the former judgment from $404.12 to $658.33, which last judgment included the allowance of two month's extra pay under the act of January 12, 1899.

II.

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment against the United States and in favor of the appellee upon the findings of fact.

III.

THE APPELLEE'S CONTENTIONS.

Briefly summarized, are as follows:

First. That one of the members of said court-martial, and its presiding officer, was then an officer of the Regular Army, and his presence, therefore, as

a member of said court was in violation of the provisions of the seventy-seventh article of war.

Second. The court in the first instance having found the appellee not guilty, both upon the specification and the charge, the later action of said court and reconsideration of the case was illegal and void and contrary to the fifth amendment to the Constitution and also of the one hundred and second article of war.

Third. That the court was reconvened under an order of the commanding officer, which failed to comply with the provisions of paragraph 957 of the Army Regulations of 1895, then in force.

Fourth. That although the commanding officer approved the sentence of dismissal and ordered it to be carried into execution, it has never been approved by the President of the United States.

In the cross appeal filed by Brown the following contentions are also made.

Fifth. That the Court of Claims erred in finding as a fact that the entire regiment was mustered out May 25, 1899; also in finding as a fact that the appellee was then mustered out with the regiment. (Finding VII, Rec., p. 9.)

Sixth. That if the appellee was on May 25, 1899, in fact or constructively mustered out or discharged from the service, the Court of Claims erred in excluding the *three* months' extra pay to which it is claimed he is entitled under the act of January 12, 1899, *supra*. (30 Stat. L., 784).

IV.

ARGUMENT.

(First point.)

WAS THE COURT-MARTIAL LEGALLY CONSTITUTED?

Attack has been made upon the jurisdiction of the court-martial, for the reason that the appellee, a first lieutenant in the volunteer service of the United States, was in November, 1898, tried by a general court-martial consisting of five members (the minimum number), of whom one had the rank of second lieutenant in the Regular Army, while serving as a volunteer officer under the rank of lieutenant-colonel, to which he had been regularly commissioned and assigned to the Second United States Volunteer Infantry; the appellee insisting that this was in violation of the seventy-seventh article of war.

The seventy-seventh article of war reads as follows:

> Officers of the Regular Army shall not be competent to sit on courts-martial to try officers or soldiers of other forces, except as provided in article 78.

(Article 78 qualifies officers of the Marine Corps, detached for service with the Army by order of the President, for service with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army or the forces of the Marine Corps so detached.)

The appellee's contention is believed to be without merit, for the reason that while it is true that Lieutenant-Colonel Grubbs, a member of the court-martial which tried the appellee and who presided over its deliberations, was at said time in a sense an officer of the Regular Army; yet at the same time he was only nominally such, for the reason that he was detached therefrom upon an indefinite leave of absence, and was, in fact, at said time a duly commissioned officer in the Volunteer Army of the United States and serving as such and so described in the order convening the court. (Rec., p. 7.)

He was as much an officer of the volunteer forces at that time as if he had theretofore been discharged from the Regular Army and had enlisted anew in the Volunteer Army, or as if he had never in fact been connected with the Regular Army. In the nature of things, he could not serve in both armies at the same time, and it was only by suspending his active connection with the Regular Army and joining and becoming an integral part of the volunteer forces that he could serve with the latter and draw his salary as such. In other words, he could not be an officer in both armies at the same time (at least actively), and his active connection with the Army at said time was with the volunteer forces and not with the Regular Army, and hence the contention of the appellee must fail.

The case of *McClaughry* v. *Deming* (113 Fed. Rep., 639; 186 U. S., 49), and relied upon by the appellee

with confidence, is not apposite. Deming, who was an officer in the Volunteer Army of the United States, was tried by a court-martial *composed entirely of officers of the Regular Army*. In that case it was neither contended nor shown that any member of said court was in any way connected with the Volunteer Army.

The status of its members, therefore, was entirely different from that of the status of the members of this court, all of whom held commissions in the volunteer service and only one of whom, Lieutenant-Colonel Grubbs, had any connection, however remote, with the Regular Army. The decision of the court in the *Deming case* (*supra*), holding that the court-martial was illegally constituted, is therefore without force of application to the case at bar.

While it is true that in the opinion of the court in the case cited, delivered by Mr. Justice Peckham, it was held that:

> There has been a tendency on the part of the regular, whether officer or private, to regard with a good deal of reserve, to say the least, the men composing the militia as a branch not quite up to the standard of the Regular Army, either in knowledge of martial matters or in effectiveness of discipline, and it can readily be seen that there might naturally be apt to exist a feeling among the militia that they would not be as likely to receive what they would think to be as fair treatment from regulars as from members of their own force. * * *

> It is most probable that Congress recognized all these reasons in its earliest legislation upon the subject as considerations upon which that legislation was founded (p. 56),

yet it is submitted that the above reasoning will not apply to the case at bar, for the reason that the regular in this case had become the volunteer and, it must be believed, had parted with the "reserve" of which the court speaks in the case cited; and, moreover, it would seem that the objections raised in the minds of the militia or volunteers to being tried by regulars would be dissipated in cases where a regular officer united his fortunes with the forces of the volunteers.

This distinction is clearly drawn and recognized by military law writers.

Thus Benét, in his Military Law and Court-Martial (sixth ed., 1868, p. 25), says:

> A court composed of regular officers can not try a volunteer officer, although a regular officer may be tried by a court of volunteers. *Regular officers detailed and sitting as officers of a higher court may try volunteers, but only when holding commissions in the volunteer service*, and a mixed court, composed of regular and volunteer officers, would have authority to try regular officers only. This is unjust to the officers of the regular service, and the Articles of War should be so modified as to place them on a footing with officers of volunteers.

Benét was regarded as authority during the period of the civil war particularly, and his treatise was the text-book of all military trials.

A REVIEW OF THE LEGISLATION RELATIVE TO MILITARY TRIALS, AND ITS INTERPRETATION BY THE DEPARTMENT CHARGED WITH THE ADMINISTRATION AND EXECUTION OF THE LAWS RELATING THERETO, IS CONVINCING OF THE VALIDITY OF THE SENTENCE OF THE COURT-MARTIAL IN CONTROVERSY.

The amenability of officers and enlisted men to military jurisdiction and the eligibility of officers for detail as members of courts-martial result from the military status which is created in their behalf by several enactments of Congress, which prescribe the form, manner, and conditions of their appointment or enlistment. This amenability is fully set forth in the Articles of War, a set of statutory regulations enacted by Congress in virtue of authority "to raise and support armies" and "to make rules for the government and regulation of the land and naval forces," which is vested in the legislative department of the Government by the Constitution.

The legislative status of the Articles of War during the first seventeen years of our constitutional history was in some respects unique. The articles adopted by the several resolutions of the Continental Congress, and which were in force during the war of the Revolution, should have ceased to have obligatory force when the Government under the Articles of Confederation ceased to exist. As a matter of fact, however, they were continued in force by the act of September 29, 1789, entitled "An act to recognize and adapt to the Constitution of the United States the establishment of the troops raised under the

resolves of the United States in Congress assembled, and for other purposes." The enactment provides:

> That the said troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war as may hereafter by law be established. (Sec. 4, act of Sept. 29, 1789; 1 Stat. L., 95.)

By the act of April 10, 1806, the Articles of War of 1776 and 1786, which had been in force in the Revolutionary armies, were reenacted with certain modifications and additions, and as so reenacted remained in force until 1878, when they were for the last time revised and embodied in the general revision of the laws as section 1342 of the Revised Statutes.

The articles, in their original English form, contained no exceptions in their application to militia or other troops constituting the royal military establishment, as no military forces, save the standing army, were embodied, for any considerable length of time, from the close of the Parliamentary wars until the great war with France in the middle of the eighteenth century. In their application in the United States, however, as several descriptions of force were employed in the continental armies, provision was made for the composition of courts in the following article:

> The officers and soldiers of any troops, whether minutemen, militia, or others, being mustered and in continental pay, shall, at all

> times and in all places, when joined or acting in conjunction with the regular forces of the United States, be governed by these rules or articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender.
>
> That such militia and minutemen as are now in service and have, by particular contract with the respective States, engaged to be governed by particular regulations while in continental service, shall not be subject to the above articles of war. (Sec. XVII, Art. 1, Res. of Cong., Sept. 20, 1776.)

In the code of 1806 the composition of courts-martial was regulated by the ninety-seventh article, which provided that—

> The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times and in all places, when joined or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers. (Act of Apr. 10, 1806; 2 Stat. L., 371.)

The last clause of the article above cited was a reenactment of section 6 of the general militia law

of February 28, 1795, which contained the requirement that—

> Courts-martial for the trial of militia shall be composed of militia officers only. (Act of Feb. 28, 1795; 1 Stat. L., 424.)

If the ninety-seventh article of the code of 1808 be compared with the corresponding provisions of the code for the government of the continental armies it will be seen that the separate jurisdiction which was created in behalf of the colonial levies in the articles of 1776 and 1786 was no longer provided for. This was due to the fact that the Constitution provided for two classes of military force, and no more; these were (1) the force raised by Congress in pursuance of its power "to raise and support armies" and (2) the militia, a force provided for in the clauses of the Constitution which vest power in Congress—

> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. (Constitution, Article I, sec. 8, par. 14.)
>
> To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. (Ibid., par. 15.)

It has been seen that article 97 of the code of 1806 continued in force until 1878, when it was replaced

in the revision of the laws by the sixty-fourth, seventy-seventh, and seventy-eighth articles of war (1342 R. S.), which have already been made the subject of judicial interpretation by this court. (*McClaughry* v. *Deming*, 186 U. S., 49.)

> ART. 64. The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the articles of war, and shall be subject to be tried by courts-martial. (Sixty-fourth article of war.)
>
> ART. 77. Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article 78. (Seventy-seventh *ibid.*)
>
> ART. 78. Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps who may be present and duly authorized shall be obeyed. (Seventy-eighth *ibid.*)

The forces raised directly by the Government of the United States have, since 1789, been composed of regular troops and volunteers, the chief difference between them being the length of the contractual engagement of the enlisted men and the tenure of office of the commissioned officers. This distinction

is fully set forth in the following opinion of the Judge-Advocate-General:

> The volunteer force during the civil war was not a part of the militia, but of the Army of the United States. Though assimilated to the militia in some respects, as, for example, in the mode of original appointment of regimental and company officers, it was as distinct *in law* from the militia as was the so-called "regular" contingent of the Army. Volunteer officers, once mustered into the service of the United States, and while they remained in that service, did not differ substantially from regular officers in their status, rights, or otherwise. Their tenure of office was, indeed, briefer; this, however, was not a material legal distinction, since the term of regular officers was also in some cases limited by statute to a definite period—as the duration of the existing war. (Par. 2444, Dig. of Opin. J. A. Gen.)

Although volunteer forces, in the present understanding of that term, were first employed in active military operations during the war with Mexico, there is statutory support for the view that it was contemplated by Congress to employ them at an earlier period. The act of May 28, 1798, passed in contemplation of the war with France, contained the requirement that—

> In addition to the aforesaid number of troops the President is hereby empowered, at any time within three years after the passing of this act, if, in his opinion, the public interest

> shall require, to accept of any company or companies of volunteers, either of artillery, cavalry, or infantry, who may associate and offer themselves for the service; who shall be armed, clothed, and equipped at their own expense, and whose commissioned officers the President is hereby authorized to appoint; who shall be liable to be called upon to do military duty, at any time the President shall judge proper, within two years after he shall accept the same; and when called into actual service, and while remaining in the same, shall be under the same rules and regulations and shall be entitled to the same pay, rations, forage, and emoluments of every kind, excepting bounty and clothing, as the other troops to be raised by this act. (Sec. 3, act of May 28, 1798; 1 Stat. L., 558.)

In the foregoing enactment it will be noted that the volunteer forces which were authorized to be raised, "when called into actual service and while remaining in the same," were to be "under the same rules and regulations * * * as the other troops to be raised by this act." By a subsequent enactment it was provided that—

> The companies of volunteers and the members of each company * * * shall submit to and observe such rules of training and discipline as shall be thought necessary to prepare them for actual service; and which rules the President of the United States is hereby authorized to make and establish. (Act of June 22, 1798, 1 Stat. L., 569.)

In 1807 and 1812 authority was again conferred upon the President to raise a force of volunteers, and it was provided that—

> When called into actual service, and whilst remaining therein, shall be under the same rules and regulations and be entitled to the same pay, rations, forage, and emoluments of every kind, bounty and clothing excepted, with the regular troops of the United States. (Sec. 2, act of Feb. 24, 1807, 2 Stat. L., 419; act of Jan. 2, 1812, 2 Stat. L., 670; act of Feb. 6, 1812, 2 Stat. L., 676; act of July 1, 1812, 2 Stat. L., 774.)

As the records of the War Department were destroyed during the occupation of the city of Washington by the enemy in 1814, but few records of trial by courts-martial prior to that date have been preserved, so that it is impossible to ascertain from such records of trial the exact composition of the courts convened for the trial of members of the military establishment; nor is it possible to ascertain with exactness what volunteer organizations, if any, were raised for the prosecution of the war with England in 1812 to 1815. So far as the records of the Department are concerned, the conclusion is warranted that the troops employed in the war of 1812 were composed of regulars and militia only.

The next occasion for the employment of volunteers arose in 1846, when, in the act recognizing the existence of the war with Mexico, authority was given for the organization of 50,000 volunteers; the act provided that—

> said volunteers shall, when called into actual service and while remaining therein, be subject to the rules and articles of war, and shall be in all respects, except as to clothing and pay, placed on the same footing with similar corps of the United States Army. (Sec. 4, act of May 13, 1846, 9 Stat. L., 9; secs. 3 to 5, act of March 3, 1847, 9 Stat. L., 184.)

The practice of forwarding records of trial by general courts-martial to the War Department, from commands engaged in active operations in the field, was not well established during the Mexican war; partly for that reason, partly because of the infrequency and uncertainty of mail communication, and partly for the reason that the forces engaged in the operations conducted by Generals Taylor and Scott were actively employed in the field, but few records of trial found their way to the War Department.

The records of courts-martial which are filed in the War Department, however, indicate that, in one case at least, a general court-martial was appointed, the president of which was a regular officer, serving under a volunteer commission. This court was convened at the Presidio of San Francisco, and was presided over by Maj. James A. Hardie, a lieutenant of artillery in the regular establishment who was also serving as a major of the First New York Volunteer Infantry by appointment of the governor of the State of New York.

It is also interesting to note, as indicating that the status of volunteer troops under the ninety-seventh

article of war was receiving administrative consideration, that, at the outbreak of the war with Mexico, an opinion was rendered by Lieut. S. C. Ridgeley, the acting judge-advocate of the Army, in which it was said that a court for the trial of regular soldiers could not be composed in part of officers of the Arkansas volunteers. But this expression of opinion was not approved by the commanding general and was never applied in practice.

At the outbreak of the civil war, in 1861, large forces of volunteers were raised by the several States and accepted by the War Department in the operation of appropriate enactments of Congress.

Act of July 22, 1861 (12 Stat. L., 268).
Act of July 24, 1861 (12 Stat. L., 274, chaps. 16 and 17).
Act of July 29, 1861 (12 Stat. L., 279).
Act of August 3, 1861 (12 Stat. L., 287).
Act of August 5, 1861 (12 Stat. L., 314).
Act of July 17, 1862 (12 Stat. L., 597).

At an early stage of the war of the rebellion it became necessary to assign a status to the newly organized volunteer forces in matters relating to the administration of military justice. The case was presented to Judge-Advocate-General Joseph Holt, and the opinion rendered by him, which was adopted by the Secretary of War, governed the Department in respect to the composition of courts-martial for the trial of officers and enlisted men of the volunteers, so long as any of such forces remained in the military service.

The Judge-Advocate-General was of opinion that—

A court composed of regular officers can not try a volunteer officer, though a regular officer may be tried by a court of volunteers.

A mixed court composed of officers belonging to the Regular Army, to the volunteer service, and to the Invalid Corps would have authority to try regular officers only.

The Invalid Corps is regarded as a part of the volunteer service.

The words "militia officers" as employed in the ninety-seventh article of war have been interpreted since the commencement of the rebellion as synonymous, so far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished. (Record Book, Vol. V, p. 320.)

A court composed of regular officers can not try a volunteer officer, though a regular officer may be tried by a court of volunteers. A mixed court, therefore, composed of officers belonging to the Regular Army, to the volunteer service, and to the Invalid Corps (which is regarded as part of the latter) would have authority to try regular officers only. (Dig. Opins. J. A. G., 1865, p. 16.)

Drafted men or substitutes not belonging to the "regular forces" in the sense of this article are entitled to be tried by courts-martial composed entirely of "militia" officers, which term is held to embrace officers of the volunteer service. (*Ibid.*)

> Officers of the Veteran Reserve Corps can not be tried by a court-martial composed in whole or in part of officers of the Regular Army, this corps being regarded as a part of the volunteer force. So of officers of the United States colored troops. (*Id.*)

It was also held that regular officers and enlisted men could be tried by courts composed wholly or in part by officers or volunteers:

> A general court-martial has unquestionably the right to try regular soldiers, though all its members are officers in the volunteer service. (*Ibid.*)
>
> Volunteer officers may be associated with regular officers on courts-martial for the trial of regulars. (*Id.*)

But no such interpretation has been placed at any time upon the ninety-seventh article of war in its application to a case in which an officer, though holding a dormant regular commission, has been regularly inducted into the military service as an officer of volunteers, and *the practice and decisions of the Department have uniformly been that such an officer may lawfully sit as a member of a court for the trial of officers and enlisted men of the volunteer forces.*

A question having arisen as to whether an officer of the Regular Army having a volunteer commission could lawfully sit as a member of a court-martial for the trial of officers and enlisted men of the volunteer forces, the following expression of opinion was furnished by Judge-Advocate-General Holt on September 18, 1862:

> The fact that a part of the officers detailed for the court-martial, according to the rank they hold in the volunteer service, belong also, in subordinate capacities, to the Regular Army, does not, under the ninety-seventh article of war, invalidate the organization of the court. This has been the uniform decision of the War Department, and the practice of the service has been in accordance with it.
>
> The detail, however, of Lieutenant Williston as a member of the court presents an entirely different question. He is an officer of the Regular Army and holds no commission in the volunteer service. It can not be said that such a court-martial is, in the language of the law, composed entirely of militia officers. He does not cease to be a member of the court because he absented himself during the trial. He might before entering on the trial have been withdrawn and a volunteer officer substituted in his place by the authority appointing the court, and this would no doubt have cured the existing defect in its composition. His voluntary absence can have no such effect. A court thus constituted has no power to try an officer belonging to the volunteer service. (Record Book, Vol. I, pp. 466–67.)

Appended to the foregoing opinion is a note, in which it is said that:

> Upon a reconsideration of the question above discussed, the opinion is entertained that it may properly be held (and would be a preferable rule to adopt) that the mere designation of an officer of the Regular Army in the order

> containing the detail does not, in the sense of the article of war referred to, constitute him a member of the court which tries this case, he not having been sworn as such nor taking part in the trial as a component thereof. If, however, he should be sworn, and thus become a component member and enabled to exert an influence in the case by reason of his association with the other members, the proceedings would be invalidated. It is believed that the spirit of the ninety-seventh article of war would require this ruling, even though he should not actually participate in the trial.

It was again held by the same authority, in June, 1863, that—

> It has been uniformly held by this office that officers of the Regular Army can not sit upon the trial of officers of United States volunteers unless they also hold commissions in the volunteer service, in which case they can so sit. The term "militia officer," in the ninety-seventh article of war, is held to embrace officers of volunteers. (Record Book, Vol. II, p. 504.)

During the civil war a considerable number of officers of the Regular Army received volunteer commissions—some by appointment of the President, others by appointment of the governors of States. Some of these appointments were to the grade of general officer; others received State commissions as colonels or lieutenant-colonels of regiments of volunteers. While so serving their regular commissions were dormant and they performed none of the duties

assigned by law or regulations to their officers in the military establishment, from which, indeed, they were in fact detached during their incumbency of office in the volunteer forces. The status so existing was authorized and created by statute. The act of July 22, 1861, contained the requirement that—

> The President may select the major-generals and brigadier-generals provided for in this act from the line or staff of the Regular Army, and the officers so selected shall be permitted to retain their rank therein. (Sec. 4, act of July 22, 1861, 12 Stat. L., 268.)

The act of July 29, 1861, chapter 24, in making provision for the disbandment of the organizations which were added to the Regular Army for the period of the war, contained the requirement that—

> All of the officers of the Regular Army who have been or may be detached or assigned to duty for service in any other regiment or corps shall resume their positions in the Regular Army and shall be entitled to the same rank, promotion, and emoluments as if they had continued to serve in their own regiments or corps. (Sec. 7, act of July 29, 1861, 12 Stat. L., 279.)

In a subsequent section of the same enactment it was provided that—

> The enlistments for the regiments authorized by this act shall be in charge of the officers detailed for that purpose who are appointed to said regiments from civil life; and that in the meantime the officers appointed to the same from the Regular Army shall be detailed by the

> commanding general to such service in the volunteer regiments now in the field as will, in his judgment, give them the greatest military instruction and efficiency; and that the commanding general may, in his discretion, employ said officers with any part of the regular forces now in the field, until the regiments authorized by this act shall have been fully recruited, and detail any of the officers now in the Regular Army to service with the volunteer regiments now in the field, or which may hereafter be called out, with such rank as may be offered them in said volunteer regiments, for the purpose of imparting to them military instruction and efficiency.

In a general order issued by the War Department on August 15, 1862, it was provided that—

> Officers of the Regular Army will, as a general rule, receive leaves of absence to accept the rank of colonel in volunteer regiments, but not lower grades. Noncommissioned officers and privates will be discharged on receiving commissions in volunteer regiments. (General Orders, No. 107, War Department, August 15, 1862.)

At the outbreak of the war with Spain a considerable force of volunteer troops was authorized to be raised by Congress, and these troops were to be raised in part by the States and in part by the Government, acting through the instrumentalities of the War Department. Very complete provision was made for the appointment of regular officers to office in the volunteer forces so raised and organized, the act of

April 22, 1898 (30 Stats., 361), as amended by the act of May 28, 1898, providing that—

> The governor of any State or Territory may, with the consent of the President, appoint officers of the Regular Army in the grades of field officers in organizations of the Volunteer Army, and the President may appoint officers of the Regular Army in the grade of field officers in organizations of the volunteer army raised in the District of Columbia and the Indian Territory and in the regiments possessing special qualifications provided for in section six of an act of Congress approved April twenty-second, eighteen hundred and ninety-eight, and in section two of the act of Congress approved May eleventh, eighteen hundred and ninety-eight; and officers thus appointed shall be entitled to retain their rank in the Regular Army: *Provided*, That not more than one officer of the Regular Army shall hold a commission in any one regiment of the Volunteer Army at the same time: *And provided further*, That officers so appointed shall be entitled to receive only the pay and allowances of their rank in the volunteer organization. (Sec. 2, act of May 28, 1898, 30 Stat. L., 421.)

In the case at bar the officer, having been duly commissioned as an officer of a regiment of United States volunteers, is *prima facie* a volunteer officer, and as such is eligible to sit at the trial of an officer or enlisted man of the volunteer forces.

The language used in the statute is clear, and that used in the permissive enactments of 1861 and 1898,

hereinbefore cited, authorizing officers of the Army to accept appointments in the volunteer forces, is equally clear. If it were intended that regular officers, who held office in volunteer regiments, in the operation of express legislative sanction in that regard, were not to be vested with the same rights as other volunteer officers, or were to be forbidden to sit as members of courts-martial appointed to try officers and men of the volunteer establishment, language calculated to make that intention plain would have been used, if such was, in fact, the legislative intent, but no such language was used.

It must be assumed that Congress was familiar with the long-established administrative practice of the War Department in the execution of the ninety-seventh article of the code of 1806 and in the similar execution which was given to the sixty-fourth, seventy-seventh, and seventy-eighth articles of the code of 1878. In the absence of restrictive language we submit that the language used in the permissive act of May 28, 1898, should be given its ordinary meaning and that the officers serving in volunteer regiments should be regarded as having the same rights and privileges and as being charged with the same duties and obligations as other officers of the volunteer forces raised by Congress for the prosecution of the war with Spain.

In the case now before the court the officer who sat as a member of the court-martial held a volunteer commission, and therefore conformed to the requirements of the statute in that regard. He had been

selected by the President as one well qualified to hold the rank and perform the duties of a lieutenant-colonel in a regiment of volunteer infantry. He had held office for nearly six months at the time he was placed on court-martial duty, and should be presumed, after so much service with volunteer troops, to have been familiar with disciplinary needs of the volunteer forces.

The attention of the court is elsewhere drawn to the serious consequences that would ensue upon a reversal of the executive interpretation which was placed upon the ninety-seventh article of war over sixty years ago. During the war with Mexico it is seen to have been the practice to permit a regular officer holding a volunteer commission to sit as a member of a court for the trial of volunteers. At the outbreak of the civil war the question was fully and carefully reconsidered and the conclusion reached that, as volunteer troops were assimilated in their organzation and discipline to the militia forces, courts-martial for their trial should be composed of volunteer officers only. But it was also held, upon equal consideration, that one having a dormant regular commission, but who exercised the functions of military office in the volunteer forces into which he had been inducted by a lawful exercise of the appointing power was competent to take part in the trial of officers and enlisted men of the volunteers. Under the administrative practice which ensued upon the interpretation so placed by the Department on the ninety-seventh article of war great numbers of courts have

been appointed, acquittals have been reached, convictions have been had, sentences have been imposed and executed, benefits and emoluments growing out of subsequent enactments of Congress have accrued, and the obligations so created have been satisfied.

DEPARTMENTAL CONSTRUCTION.

The courts have always attached great weight and shown great respect for the construction placed upon a statute by the Department from which the statute doubtless emanated in the first instance and which is charged with the interpretation and execution of the same.

In this case there has been long-continued departmental construction of the statute in question, and under it the rights of a large number of officers who have been tried by courts-martial similarly constituted have been determined, and it is submitted that the construction placed upon this statute by the War Department, continuing as it has for a period of nearly half a century, has acquired the force of law, and this construction should not be lightly overturned by the court unless the strongest and most cogent reasons are shown therefor.

Rogers v. *Goodwin*, 2 Mass., 476.
Brown v. *United States*, 113 U. S., 568–571.
Edwards v. *Darby*, 12 Wheat., 206.
United States v. *Hill*, 120 U. S., 169, 182.
United States v. *Philbrick*, 120 U. S., 52–59.
United States v. *Johnson*, 124 U. S., 237.
Robertson v. *Downing*, 127 U. S., 607–613.

In the last-mentioned case the court, speaking through Mr. Justice Field, said:

> Where there has been a long acquiescence in a departmental regulation, and by it the rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most active and persuasive reasons.

The respect in which the doctrine of contemporaneous construction by a Department charged with the execution of a law has long been held by the court, together with the reasons for the same, find expression in two recently decided cases, *Midway Company* v. *Eaton* (183 U. S., 609), and *United States* v. *Finnell* (185 U. S., 236, 243–244).

In the former case the court, speaking through Mr. Justice McKenna, said:

> It is natural to respect the rulings of the Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident presumption of its meaning.
>
> One of the reasons is that the officers of the Land Department may have recommended the statute—indeed, may have written its words; at any rate, were familiar with the circumstances which induced the legislation.

Likewise in the *Finnell case* (*supra*), the court further emphasizes the principle here contended for and follows the departmental construction of a statute,

wherein the court, speaking through Mr. Justice Harlan, says:

> These views are justified by long practice in the Department, and upon that we may properly rest our affirmance of the judgment of the Court of Claims. * * * It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by the accounting officers for many years should be overthrown, we apprehend that much confusion might arise. Of course if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge (citing cases). But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many years of the Department charged with the execution of the statute should be respected, and not overruled except for cogent reasons (citing cases). Congress can enact such legislation as may be necessary to change the existing practice if it deems that course conducive to the public interests.

As indicated by the learned justice who delivered the opinion in the latter case, so in the present case, and with even greater force, "much confusion would arise" and thousands of cases would be involved by the overturning of the unbroken construction of the

accounting officers; and, as also suggested in said opinion, "Congress can enact such legislation as may be necessary to change the existing practice if it deems that course conducive to the public interests."

This construction of the statute in question by the Departments charged with its execution, not only contemporaneous with the enactment of the statute itself, but unbroken and uninterrupted as it has been, has also been sanctioned by long acquiescence on the part of the Legislature and practically so by the judicial tribunals. Is not this the strongest evidence that said statute has been rightly construed and interpreted? It has been held by numerous decisions of the courts that a construction under such circumstances becomes established law. (*Hahn* v. *United States*, 107 U. S., pp. 402–406; *United States* v. *Pugh*, 99 U. S., 265; *Edwards* v. *Darby*, 12 Wheat., 210. See also *United States* v. *Alexander*, 12 Wall., 177; *Peabody* v. *Stark*, 16 id., 240; *Smythe* v. *Fisk*, 23 id., 374; *United States* v. *Moon*, 95 U. S., 760.)

The court in the latter case, in its opinion, delivered by Mr. Justice Swayne, said:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. (*Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *The State Bank of North Carolina*, 6 Pet., 29; *United States* v. *MacDaniel*, 7 id., 1.) The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the

> laws they are afterwards called upon to interpret. * * * A thing may be within the letter of the statute and not within its meaning; and it may be within the meaning although not within the letter. (Citing cases.)

In a still later case, that of the *United States* v. *Sweet* (189 U. S., 471), the court holds, speaking through Mr. Justice Holmes, that—

> The weight of a contemporaneous and long-continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt. (Citing *United States* v. *Johnston*, 124 U. S., 236, 253; *United States* v. *Finnell*, 185 U. S., 236, 244.)

If the decision of the Court of Claims is permitted to stand, it will invalidate a vast number of sentences imposed by courts-martial similarly constituted, during both the civil war and the war with Spain, thus involving the unsettling of matters of the most far-reaching importance, which up to this time have been regarded by the Government and all parties concerned as fully and finally adjudicated and settled. It will be productive of unspeakable confusion and chaos, and serve no good purpose.

IV.

(Second point.)

DID THE COURT HAVE JURISDICTION TO RECONSIDER AND REVERSE ITS FORMER FINDINGS?

The appellee insists, and this is his main contention, that under the fifth amendment of the Constitution, and also under the one hundred and second article

of war, the court-martial was without jurisdiction to reconsider its finding of not guilty, and that a sentence based upon reconsideration of said finding is illegal and utterly void.

In the consideration of this subject it must be constantly kept in mind that trials of this character differ in many essential particulars from trials in civil or criminal courts. Courts-martial exist and have their jurisdiction by virtue of *military* law, the court being constituted and empowered to act in each instance *by authority from a commanding officer* (Bouvier). Decisions of courts-martial are unquestionably subject to revision by the commanding officer, the officer ordering the court, or by the President or sovereign, as the case may be. (11 Johns N. Y., 150; also all military text-books.) Both in the organization of the court and in the right of revision this court differs very radically from the civil court. It is convened solely by authority of the commanding officer or the commander in chief of the Army. He alone is empowered to convene it, and he alone, or the President, or the sovereign, may revise its findings. Keeping in mind, then, this power of revision which vests in the commanding officer who calls the court into existence and may supervise its action, and recollecting that the approval of such commanding officer is a prerequisite to the validity of the sentence (Winthrop, 686), and that by article 112 he is invested with sole discretion and authority and that he is to act upon his best judgment in the light of the facts and the law (Winthrop, 687), and

that this authority is not affected by the absence of the accused, thus differing in a very essential respect from the practice and procedure of the civil courts, which includes those of criminal jurisdiction, and also keeping in mind that he can approve or disapprove, in whole or in part, and that his disapproval is tantamount to an acquittal by the court (13 Opinions Attorney-General, 460), it is seen that very wide discretion is lodged in the commanding officer ordering and convening the court. It is erroneous to assume that the trial of the accused officer was concluded after the testimony had been taken and a finding of not guilty made and certified to the commanding officer. This would undoubtedly be true were it not for the fact that this revisionary power rested with and remained in the commanding officer, and until he had exercised that power, either by confirming and approving the sentence of the court-martial or in its disaffirmance or disapproval, a trial had not taken place. In other words, action by the commanding officer was a part of the proceedings which constituted the trial of the accused, and undoubtedly an indispensable accompaniment to the same.

Thus in the cases of *Brodie*, *Coffey*, *Hanshew*, and *Morris* (128 Fed. Rep., 665) the United States Circuit Court of Appeals, in delivering its opinion through Van Devanter, judge, says:

> While a court-martial can not be altogether likened unto a civil court in which the guilt of the accused is to be pronounced by a jury, under the supervision of a judge, and the penalty

is to be fixed by the judge within the prescribed limits, it is yet true that a court-martial acts only in response to the call of a superior authority and that the result of its deliberations is somewhat in the nature of a recommendation to that authority (1 Winthrop Mil. Law, 632; Davis Mil. Law, 15) is without effect unless approved by it, and until then is interlocutory and inchoate only. (*Runkle* v. *United States*, 122 U. S., 543, 555; *Mills* v. *Martin*, 19 Johns, 7, 30.) The superior authority which orders a court-martial, and to which its conclusion must be submitted for approval or disapproval, is spoken of as the reviewing authority. Its action being indispensable to a final conclusion or judgment, the reviewing authority is an essential component of the original tribunal, and is not entirely a court of errors.

Whatever the finding of the court, an officer or enlisted man in arrest or confinement is not released from arrest or confinement until the reviewing or convening authority has acted on the case and authorized the release.

In the exercise of the authority lodged in him, the commanding officer, upon the receipt by him of the first finding of the court-martial, ordered the same to be returned for reconsideration, with the indorsement thereon: "The evidence in this case is conclusive as to the guilt of the accused. Four witnesses testify that they saw him gambling with enlisted men, while two witnesses, whose memory is faulty, testify negatively. The accused denies

the allegation. It is recommended that the proceedings be returned to the court for a reconsideration of its finding."

This action on the part of the commanding officer was in entire accord with paragraph 957 of the Army Regulations, which provides as follows:

> When the record of a court exhibits error in preparation or seemingly erroneous conclusions, the reviewing authority may reconvene the court for a reconsideration of its action, pointing out defects. Should the court concur in the views submitted, it will proceed by amendment to correct its errors, *and may modify or completely change its findings.* A reopening of the case by calling or recalling witnesses is illegal.

Here there was no reopening of the case by calling or recalling witnesses. There was simply a reconsideration.

Learned counsel for appellee in his brief in the Court of Claims (p. 66), after stating that he has examined a long list of authorities upon military law, naming them, adds:

> There is nothing in any of these works to sustain the contention that a court-martial may, on being reconvened, lawfully revoke or reconsider an acquittal, or that it may be reconvened for such purpose, except a footnote in Winchell at page 696.

Painstaking examination has been made of the authorities referred to by opposing counsel, and it is as confidently stated that with the possible excep-

tion of O'Brien, who himself states later that he submits his views with much diffidence, being aware that there is much difference of opinion, there is nothing in any of these works to sustain the contention that a court-martial *may not*, on being reconvened, lawfully revoke or reconsider an acquittal, or that it *may not* be reconvened for such purpose.

All the authorities acknowledge the right of revision which rests with the commanding officer, and that he may or may not return the record to the court-martial for reconsideration, though not for retrial, by the recall either of old witnesses or of new ones.

Having in mind the fact that the first finding of the court-martial was not rendered in the presence of the accused, but was in fact rendered in his absence and without his knowledge of the same, and that afterwards his only knowledge of such fact was communicated to him by the record itself, which record showed that after revision and reconsideration, when the court had finally concluded its labors, he was adjudged to be guilty and sentence of dismissal was ordered thereupon, it becomes more apparent how that in these proceedings there was no complete trial in the first instance, and hence there could be no former jeopardy, inasmuch as the trial properly embraced and included the definite and final action of the commanding officer. Thus Griffith says (p. 90): "The revision of the sentence is the last act in the trial which a court-martial may be called upon to perform," recognizing by this language that it is a part of the trial or an act in a trial.

The law as it exists at the present time is correctly and comprehensively stated in Winthrop (p. 696), wherein he says:

> The court on revision may so far change the finding as to substitute a conviction for an acquittal, adding thereupon a sentence, citing Griffith, 92; also G. O. 6, Dept. of Va. and N. C., 1864; G. O. 13, Dept. of Va., 1866.

The case above cited upon examination is seen to be analogous to the present case. In that case, as in this, the court, after finding the accused not guilty of the charges, was subsequently reconvened upon order of the Duke of Wellington, obeying the commands of His Majesty, to revise its former sentence, together with the grounds on which these commands were given, whereupon the court reversed its former opinion and found the prisoner guilty of all the charges. While it is true that O'Brien says "the sentence is not properly any part of the trial," and would seem to take a somewhat technical view in favor of the rights of the accused, yet he qualifies his statement by adding:

> These views on this point the author submits with much diffidence, being aware that on the abstract question of right there is much difference of opinion.
>
> It is to be regretted that the custom of war is so obscure as to cause these doubts, nor are they removed by a reference to works on military law. (Pp. 278 and 279, ed. 1846.)

Although this doubt seemingly existed in the minds of writers upon military law at the time in which

O'Brien wrote, nevertheless the consensus of later authoritative views is adverse to the opinion expressed by O'Brien. This has found expression in paragraph 957 of the Army Regulations of 1895 (corresponding to 901 of 1904) and in Benét (supra).

In the case of *Gratiot* v. *United States* (4 How., 118) it was held that as to the Army Regulations:

> This court has too repeatedly said that they have the force of law to make it proper to discuss that point anew, and such of them as were assailed in the case by counsel as not warranted by law the court think are as obligatory as any of the rest.

The power of revision and modification implies the power of reversal.

In the nature of things there could not be a trial or an acquittal without appropriate action by the officer who convened the court and whose ultimate duty it was to render final action in the premises. That there was no dissolution of this court, although after the first hearing there was an adjournment *sine die*, is beyond question, for the authorities are too numerous to be here enumerated, which hold that the court is in session until dissolved by order of the officer which convenes it. It follows, also, that if the court has been dissolved by order of the reviewing officer it can not be reconvened, but if not it is still a legal court. (Ives, 190.) Therefore, to constitute a trial the court must in the first instance have jurisdiction, in the second instance must exercise it, in the third must have finished its labors, and in the fourth its findings

must have been acted upon by the reviewing authority and the final action published. The two latter inseparables to a completed trial were absent until the court reconvened and reconsidered, and, its labors being finished, the commanding officer approved the same.

It will not do to treat the reconsideration of the evidence by the court-martial, under direction of the revisionary officer, as a second trial, for the reason that it was in fact not only a part, but an inseparable accompaniment, of the first and only trial. If it is kept in mind that there was no dissolution of the court until the commanding officer convening it dissolved it, and that the sentence is not final and does not become valid unless, except, and until it receives the approval of the sovereign or the commanding officer to whom the power has been delegated, a different view is imparted to the subject under consideration.

All the authorities on military law of any repute hold that when the punishment is inadequate reversal may be necessary (De Hart, 205), and this being true, the inevitable inference is that, when no punishment at all has been found or fixed, that in that case reversal becomes all the more necessary.

Thus a court-martial on revision is competent to amend *any defect* resulting from its own decision not connected with questions of legality or procedure. (De Hart, 205–207–212.) An attempt has been made to apply the rule in civil courts as to the conclusiveness of a verdict of not guilty and amendment of ver-

dict to the proceedings of a court-martial, which court is upon an entirely different footing, both in its organization, its jurisdiction, and its procedure. One essential distinction, as pointed out by Clode in his Military and Martial Law (p. 156), between the finding of a court-martial and the verdict of a jury is this: In one case it is essentially a secret proceeding, and the result not made known to the prisoner *until confirmed by the convening officer;* in the other, *its validity depends upon its publicity.*

In his quotation from the last-mentioned author (Clode, pp. 57–68, claimant's brief) learned counsel does not furnish the full quotation, which sheds a different light upon the matter. It is herewith appended in full:

> Having found a sentence and awarded a punishment, either in the first instance *or on revision by direction from the convening officer,* the functions of the court are terminated by the transmission of the proceedings to him.

It is very plain, therefore, that the functions of the court are not fully or finally terminated in the case of revision until after the revision has been completed, and Winthrop says (p. 68): "The word 'trial' in article 102 is to be interpreted as meaning *duly prosecuted* before a court-martial to a legal conviction or acquittal."

Here there was no legal acquittal, and hence the rule of *atrefois acquit* is not applicable.

Harwood impliedly holds to the interpretation here contended for, for he says (p. 144):

> The authority who ordered the court is competent to direct it to reconsider its proceeding for the purpose of correcting any mistake they have made in applying the evidence to the facts in issue.

This was just what was done in this case—no more, no less. Here there was no legal acquittal, nor could there have been until the verdict of the court-martial was passed on by the commanding officer, which as stated before, was indispensable.

Does not the power to revise imply the power to reverse? If the sentence is inadequate, may it not be made adequate?

The case of *ex parte Reed* (100 U. S., 13) is decisive of the present controversy. In that case, after a court-martial had found the accused guilty of certain charges and sentence was passed upon him and transmitted with the record to the revising officer, said officer returned it to said court-martial with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence; whereupon the court proceeded to revise it, and, after revoking it, substituted another, which he approved, inflicting upon Reed a severer punishment. Reed, who was imprisoned pursuant thereto, alleging that it was illegal and void and that he was thereby illegally deprived of his liberty, prayed for a writ of *habeas*

corpus, and it was held that the court-martial had jurisdiction of the person and of the subject-matter, and was competent to pass the sentence whereof Reed complained. (From syllabus.)

In that case the court also held, speaking by Mr. Justice Swayne (p. 22):

> It is clear that the court was not dissolved until after the approval of the second sentence by the admiral.

Were further authorities necessary to enforce the position of the defendant, the case of *Swaim* v. *United States* (C. Cls. R., 28, 173; 165 U. S., 553) supplies the same. In that case this court, speaking through Mr. Chief Justice Nott, says:

> When a person enters the military service, whether as an officer or private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights. He also submits himself to the administration of justice by military tribunals, whose power extends to fines and forfeitures, to the deprivation of rank and pay, to imprisonment, and even to punishment by death.

It will be noticed that the court emphasizes the essential difference between the status and rights of a person in the military service and those of a person in civil life.

Later, in said opinion, the learned Chief Justice, while denying that authority existed in the reviewing

officer to *require* the court to do that which he could not himself do—increase the severity of a sentence—states as follows:

> The question presented by the case is believed to be a new one, unless it be identical in legal effect with that which was before the Supreme Court in *Ex parte Reed* (100 U. S. R., 13). In that case there was an unequivocal offense involving no discretion on the part of the court, viz, malfeasance in the discharge of his official duty. In this case it was necessarily within the discretion of the court-martial to determine whether the acts constituted an offense, and if so, its gravity, seriousness, and degree. In both cases the punishment was within the discretion of the court. In both cases the reviewing officer disapproved the leniency of the sentence, and in both cases the court-martial complied with his recommendation and imposed a severer punishment. On the one hand it may be said of this case that the President did not interfere with the discretion of the court; that he did not require it to impose a more severe sentence; that he merely invited it to reconsider its determination of the case, and left it free to reimpose the same sentence or to impose a milder one or a more severe one. On the other hand, it may be said that the disapproval of the sentence which the court in the lawful exercise of its discretion had imposed did not leave it free to reimpose the same sentence; that disapproving it on the express ground that it was too lenient, in effect compelled the court to impose a more severe one;

> that in military life a superior officer is conceded to be invested with superior wisdom, and that in such cases the reviewing officer should not be allowed to interfere with the judgment of the tribunal in whom discretion is exclusively invested by law.
>
> But while the principle is a sound one, which civil tribunals should carefully maintain, it is believed by this court that the decision of the court of last resort in *Ex parte Reed* is conclusive upon this branch of the case.

The Supreme Court, in affirming the decision of this court in the last-mentioned case, hold as follows (syllabus):

> When a court-martial has jurisdiction of the person of the accused and of the offense charged and acts within the scope of its lawful powers, its proceedings and sentence can not be set aside by the civil courts. The action of the President in twice returning the proceedings of the court-martial, *urging a more severe sentence*, was authorized by law; and a sentence made after such action and in consequence of it was valid.

The latter court, speaking through Mr. Justice Shiras, said, referring to the case of *Ex parte Reed* (*supra*):

> This court held that such a regulation [referring to the Navy] had the force of law, but as the court-martial had jurisdiction over the person and the case, its proceedings could not be collaterally impeached for any immediate error or irregularity committed within the sphere of

> its authority; that the second sentence was not void; and accordingly the application for a writ of habeas corpus was denied. We agree with the Court of Claims that the ruling in *Ex parte Reed*, in principle decides the present question.

Attempt has been made to differentiate between increasing the severity of the punishment upon reconsideration by the court-martial and substituting *some* punishment for *no* punishment, but obviously such effort must fail.

The reasoning of the court, in the case of *Ex parte Reed* (*supra*) and *Swaim* v. *United States* (*supra*), carried to its logical conclusion, warrants the court in declaring that if a court-martial may, on reconsideration, *increase the measure* of punishment, they may also, upon reconsideration of their findings, substitute *some* punishment for *no* punishment.

Perhaps the position of the appellant can be no better stated than in the language of Mr. Justice Bradley, in delivering the opinion of the Supreme Court of the District of Columbia, in dismissing mandamus proceedings brought in that court by the claimant herein (28 Washington Law Reporter, 787):

> If the first finding of not guilty, and the judgment of acquittal had been allowed to stand, and the same charge had been submitted for trial to another court, there would appear to be no question that the former acquittal would have been a perfect defense. But that was not the case. The court was summoned by the order of the general com-

manding to consider such cases as should be presented to it for trial. That order called it into being. But for that order the members composing it were without power to assemble or to act as a court. They were equally without power to terminate their judicial functions. The court could not dissolve itself. The same power that created it must determine its existence. When it adjourned *sine die* after the acquittal of the relator, that act was no more in effect than a simple adjournment. It was still a duly organized and constituted body, subject to orders, and in duty bound to consider such matters as should be properly submitted to it. It had the power, of its own motion, before its verdict was forwarded to the reviewing authority, and possibly after it was forwarded, but before it had been approved and recorded, to reconsider its action. Why did not the power to reconsider exist upon the failure of the commanding general to approve, and upon his recommittal to it for reconsideration? That authority to recommit, and the duty to reconsider, are to be found in Army Regulations, 1900, section 957.

* * * * *

The court is not allowed to hear further testimony; it reopens the case only for further deliberation upon the views submitted to it by the reviewing authority. It is not obliged to concur in those views. Its right is to adhere to its original conclusions, and its power and right to "completely change its findings."

In a criminal case in a common-law court the jury, having returned their verdict, have

the power to amend and change it before it is recorded and before they are discharged. (1 Bishop Crim. Proc., sec. 1003, and cases cited.)

Nor can there be any good reason why the court, when the jury have delivered a manifestly improper verdict, should not suggest to them, before it has been recorded and before they have been discharged, that they reconsider their verdict, or why the jury, if they see proper to reconsider it, may not change it and render a different verdict. (*Ford* v. *State*, 12 Md., 546; *Burk* v. *Commw.*, 5 J. J. Mar., 675.)

In the case of the relator the Army regulation cited prescribed the powers and duties of the reviewing officer and of the court in the premises, and the proceedings appear to have been in conformity with its provisions. These regulations have the force of law. (*Gratiot* v. *United States*, 4 How., 80, 117; *Ex parte Reed*, 100 U. S., 13; *Swaim* v. *United States*, 165 U.S., 553, 565.)

In the case of Reed it was claimed that he had been twice put in jeopardy for the same offense, because, having been tried and sentenced by a court-martial, the record was returned to the court by the reviewing officer with the suggestion that the sentence was inadequate, and thereupon the court changed the sentence and made it more severe. In the case of Swaim it was claimed that the sentence of a court-martial of which he complained was void. It was the second review of an original sentence which was made more severe with each reconsideration. Reed's case was a petition for a

writ of *habeas corpus*. Swaim's case was a claim prosecuted in the Court of Claims for pay and allowances of which he alleged he had been deprived by reason of such void sentence. Reed was tried by a naval general court-martial, and the reconsideration of the sentence was pursuant to a Navy regulation that was substantially the same as the Army regulation cited above. Swaim was tried by a military court-martial; and the reviews of his sentence were made under an Army regulation then in force, almost identical in language with the present regulation No. 957. In each case it was held that the regulation warranted the course pursued.

The proceedings in the case of the relator appear to have been in accordance with law, and he has been effectually out of the volunteer service of the United States since February 17, 1899.

On appeal from the decision of the Supreme Court of the District of Columbia to the Court of Appeals, the latter court affirmed the judgment of the court below without venturing an opinion with respect to the validity of the proceedings of the court-martial. (18 App. Cas., D. C., 239.)

V.

(Third point.)

WAS THE COURT RECONVENED IN ACCORDANCE WITH LAW?

Was paragraph 957 of the Army Regulations of 1895, then in force, disregarded?

Said paragraph, as previously quoted, provides, among other things, then when the record of a court exhibits error in preparation or seemingly erroneous conclusions, the reviewing authority may reconvene the court for a consideration of its action, *pointing out defects.*

Appellee's counsel has fallen into error with relation to the facts in this matter. The record (p. 10) shows that the order of the commanding general, of date December 1, 1898, had an indorsement on the back thereof, which was, in fact, a part of the same, which fully complied with the requirements of section 957. Said order reads as follows:

> HEADQUARTERS DEPARTMENT OF SANTIAGO,
> OFFICE OF JUDGE-ADVOCATE,
> *December 1, 1898.*
>
> Respectfully returned to the Adjutant-General of the Department.
>
> The evidence in this case is conclusive as to the guilt of the accused. Four witnesses testify that they saw him gambling with enlisted men, while two witnesses, whose memories are faulty, testify negatively. The accused denies the allegation. It is recommended that the proceedings be returned to the court for reconsideration of its findings.
>
> H. R. BAILEY,
> *Captain, Fifth Infantry, Acting Judge-Advocate.*

Further comment upon this matter is deemed unnecessary, inasmuch as the court was unquestionably reconvened in all respects in accordance with law.

VI.

(Fourth point.)

WAS THE PRESIDENT'S FORMAL APPROVAL OF THE SENTENCE OF THE COURT-MARTIAL ESSENTIAL TO ITS VALIDITY?

The inquiry is raised whether or not the sentence of the court-martial is legal and binding upon the accused by reason of the fact that the same was not formally approved by the President of the United States and whether this was not in violation of the one hundred and sixth article of war, which provides as follows:

> In time of peace no sentence of a court-martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President.

It will be observed that, subsequent to the sentence of the court-martial and its approval by the commanding general, and upon the transmittal of the same to the President, the same, on January 12, 1899, was returned to the commanding general by the Judge-Advocate-General, inviting his attention to the fact that "the one hundred and sixth article of war only relates to 'time of peace,' and that the state of war still continues." (Rec., 22.)

While it is true that there had been a suspension of actual hostilities prior to that time, and that the treaty of peace had been signed by the commissioners appointed by the two warring countries, nevertheless it was not until April 11, 1899, that ratifications of said treaty of peace were exchanged between the

United States Government and the Kingdom of Spain, and it is respectfully submitted as a matter of law, concerning which there can not be any reasonable question, that until said exchange of ratifications had been effected the status of war continued and the "time of peace" had not actually begun.

Cross et al. v. *Harrison*, 16 How., 164.
De Lima v. *Bidwell*, 182 U. S., p. 1.
Dooley v. *United States*, 182 U. S., 222.
Downs v. *Bidwell*, 122 U. S., 244.
J. Ribas y Hijo v. *United States*, 194 U. S., 323.

In the latter case the Supreme Court, speaking through Mr. Justice Harlan (p. 323), says:

> A state of war did not, in law, cease until the ratification in April, 1899, of the treaty of peace.

VII.

(Fifth point.) (Raised by cross appeal.)

WAS COMPANY I, OF THE NINTH UNITED STATES VOLUNTEER INFANTRY, AND ALL THE OFFICERS, NONCOMMISSIONED OFFICERS, AND ENLISTED MEN MUSTERED OUT MAY 25, 1899; AND IF NOT DISCHARGED BY VIRTUE OF THE SENTENCE OF THE COURT-MARTIAL ON FEBRUARY 17, 1899, WAS NOT BROWN MUSTERED OUT WITH HIS MILITARY COMPANY? IN OTHER WORDS, BY OPERATION OF LAW?

The Court of Claims has answered the above inquiry in the affirmative in its findings of fact and conclusions of law thereon. (R., pp. 9, 10.) It is with the conclusions of law, based on the findings of fact, that appellee complains and maintains that the Court of Claims erred.

The appellee asserts that "all the officers * * *" of Company I (his company) were not mustered out May 25, 1899; inasmuch as he contends that he was still an officer of said company and that he was not mustered out with his company because he had petitioned for this privilege to the Secretary of War and it had been denied. Hence, he claims that he was an officer in the service of the United States up to the time of the ultimate disbandment of the Volunteer Army.

A review of the legislation and regulations under which the various organizations comprising the volunteer forces of the United States called into existence through the exigencies of the Spanish-American war and the subsequent insurrection in the Philippine Archipelago is convincing of the termination of the service of the appellee's company—his fellow-officers and the enlisted men and his own muster out with his said organization, providing the court-martial proceedings were invalid.

The Ninth United States Volunteer Infantry was organized under the act of May 11, 1898 (30 Stats., 405), which stated that the President was empowered during the war to organize ten regiments of volunteer infantry under the act of April 22, 1898.

The act of April 22, 1898 (30 Stats., 361, sec. 4), stated that "all enlistments for the Volunteer Army shall be for two years, unless sooner terminated; and that all officers and men composing said army shall be discharged from the service of the United

States when the purposes for which they were called into the service shall have been accomplished, or on the conclusion of hostilities."

By the act of March 2, 1899 (30 Stats., 981, sec. 15), Congress put an end to the volunteer force, of which the Ninth United States Volunteer Infantry was a part, by providing that "the officers and men of the Volunteer Army shall be mustered out," etc.

The appellee, therefore, could not be in the service at any time after the volunteer forces, of which he was a commissioned officer, ceased to exist. (Digest of Opinions of Judge-Advocate-General, 1757.)

Under no circumstances could his office remain in existence and the appellee be allowed to hold it after the branch of the Army to which he was attached had ceased its existence. This conclusion is so plain that further argument would seem to be unnecessary.

The muster out of the Ninth United States Volunteer Infantry was governed by the act of January 12, 1899 (30 Stats., 784), and G. O. 13, A. G. O., 1899, which contains the regulations for carrying the act into effect.

The act provides that "as far as practicable" the discharge of the officers and men of volunteer forces shall take effect on the date of the muster out of the organization to which they belong.

G. O. 13, A. G. O., 1899, *supra*, makes one exception in the case of officers and men "retained in the service by special authority of the War Department."

To be "retained" in the service an officer or enlisted man must be held under military control and discipline by competent authority. (Dig. Op. J. A. G., 1758.)

There is nothing in the record to show that the claimant was "retained" in the service by special authority of the War Department subsequent to May 25, 1899. Statement was made by appellee in the Court of Claims that the War Department "possesses exclusively the power to discharge the claimant." This view is unquestionably erroneous, inasmuch as *this power resides primarily in Congress*, and no notice is necessary, although it is generally the practice to give it. (See Dig. Op. J. A. G., 1760.)

It further follows that when Congress provided that the force of which the appellee was an officer should cease to exist, the appellee's connection with that force also ceased to exist, and his connection with the Army of the United States ceased to exist, and it was beyond the power of the Executive to continue him in the service after the muster out of such force.

The point raised by appellee, that because the War Department omitted and refused to formally muster the claimant out and discharge him upon application made to said Department subsequent to the proceedings of the court-martial, and that, he being entitled to a discharge and not receiving the same, the Government is estopped by its own act and refusal to issue said discharge from denying

his connection with the military forces even after the dissolution of the military organization with which he was connected, is without force or vitality.

Section 282, Revised Statutes, and the act of July 1, 1902, chapter 1353 (32 Stat. L., 629), have been cited to show the right of an officer to evidence of honorable discharge from the military service of the United States. Section 282 simply provides that where an officer or enlisted man of the Army finds it necessary to file his evidence of honorable discharge from the military service of the United States to secure the settlement of his accounts, the accounting officer with whom it has been filed shall, upon application by said officer or enlisted man, deliver to him such evidence of honorable discharge; or, in other words, it provides that where the officer or enlisted man has temporarily parted with the evidence of his honorable discharge for the purpose of securing the settlement of his accounts he shall be entitled to the return of the same again; and the act of July 1, 1902, provides that where any officer or enlisted man who has or shall hereafter be honorably discharged from the military service of the United States has lost his certificate of discharge or the same has been destroyed without his privity or procurement, the Secretary of War shall be authorized to furnish to such officer or enlisted man a certificate of such discharge, properly marked, so as to be known as a certificate in lieu of the lost or destroyed document, thus indicating that where an honorable dis-

charge has once been issued and the same has been either filed with the Department or lost or destroyed by the party to whom the same has issued, the same shall be returned in the first instance, or a new certificate in lieu of the old one shall be issued to said party upon satisfactory proof being furnished to the War Department.

But should we concede the right of the appellee to a certificate of honorable discharge which he did not obtain on application to the Secretary of War therefor, in that event the fact that the officer was entitled to an honorable discharge upon application to the War Department, and that said honorable discharge was refused by the War Department, would not *ipso facto* be conclusive of the officer's retention in the military service of the United States. In other words, the failure of the Department to furnish the officer with an honorable discharge upon application, because said Department believed at the time of its said refusal that the officer had already been dishonorably discharged by the sentence of the court-martial on a previous day, is, to say the least, but a shadowy pretext for the retention of the officer in the military service after the dissolution of the organization with which the officer was connected.

The whole question, therefore, irresistibly reverts, as before stated, to whether the officer was or was not mustered out of the service of the United States at the time of the muster out of his military organization, providing, of course, the officer was not discharged by

virtue of the sentence of the court-martial. As to this question, as previously suggested, under the authorities there can be little controversy. "He was not retained in service by special authority of the War Department." Neither was he, as a matter of fact, at any time subsequent to the sentence of the court-martial "under military control and discipline by competent authority," and certainly, subsequent to May 25, at any rate, was not in any way connected with the Army of the United States.

VIII.

(Sixth point. Raised by cross appeal.)

IF NOT DISCHARGED BY VIRTUE OF SENTENCE OF COURT-MARTIAL ON FEBRUARY 17, 1899, IS APPELLEE ENTITLED TO ONE MONTH EXTRA PAY UNDER AND BY VIRTUE OF THE ACT OF JANUARY 12, 1899, AS AMENDED BY THE ACT OF MAY, 26, 1900?

The Court of Claims has already, in its judgment, based on a conclusion of law which is believed to be erroneous, allowed the appellee two months' extra pay on account of honest and faithful service "beyond the limits of the United States." The appellee now claims that in addition thereto he is entitled to one month's extra pay (additional) on account of having "served honestly and faithfully within the limits of the United States."

A careful reading of the two acts above mentioned (chap. 46, 30 Stats., p. 784, and chap. 586, 31 Stats., p. 217) will convince the court that the benefits of said provisions are alternative and not cumulative.

The Court of Claims has in no instance allowed three months' extra pay to any officer or any soldier who served during the Spanish-American war, both within and without the limits of the United States.

In conclusion, it is submitted that the caustic criticism of the record in this case by the late chief justice of the Court of Claims is not warranted by a careful examination of the same. Particularly is this true in the light of the language of the same jurist in the case of *Swaim* v. *The United States* (28 C. Cls. R., 173), wherein, delivering the opinion of the court, he said:

> When a person enters the military service, whether as an officer or a private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights.

In this case there was no departure from the strict requirements of military procedure, and the decision of the Court of Claims should therefore be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States.

October Term, 1906.

Office Supreme Court
FILED
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JAMES H. McKEN

No. 283.

THE UNITED STATES, Appellant,

v.

LEWIS E. BROWN,

No. 284.

LEWIS E. BROWN, Appellant,

v.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR LEWIS E. BROWN.

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Attorneys.

(20240 and 20241.)

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LEWIS E. BROWN. } No. 283.

LEWIS E. BROWN, *Appellant*,
v.
THE UNITED STATES. } No. 284.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR LEWIS E. BROWN.

STATEMENT OF CASE.

On November 11, 1898, at San Luis, in the military department of Santiago, Cuba, before a general court martial composed of five officers, one of whom was an officer of the regular army serving temporarily under a volunteer commission, the claimant, Lewis E. Brown, a First Lieutenant in the volunteer forces of the United States, was tried on the charge of "Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war;" the specification of the charge being that on October 11, 1898, at camp near San Luis, he "did gamble with enlisted men of Co. I, 9th U. S. V. Inft." (R., 7, 8).

By order of General Wood, commanding said department, the said court martial had been appointed "for the trial of such officers as may be properly brought before it." In said order all the officers detailed to compose the court were named and described as officers of the volunteer forces (R., 7). One of these officers, designated in the order as "Lt. Col. H. Y. Grubbs, 2d. U. S. V. I." and who presided at the trial was then an officer of the regular army, which fact was unknown to the accused (the claimant) until May, 1902, (R., 9).

The accused pleaded not guilty to the charge and to the specification. The court, after hearing the testimony of the witnesses for the prosecution and for the accused, respectively, and after a full trial on the merits, found and adjudged him not guilty of said charge and specification and fully and finally acquitted him. Thereupon the court adjourned *sine die* and sent the record of said trial to Gen. Wood (R., 8).

Twenty-five days later, on December 6, 1898, the same court reconvened and by command of Gen. Wood, but without notice to the accused and in his absence, the court reconsidered its former action and declared its former findings revoked and substituted therefor findings of guilty with sentence of dismissal from the service, and again adjourned *sine die* (R., 8).

Thereupon, Gen. Wood, being advised by the War Department that a "state of war still continues" and that therefore the action of the President was not required under the One hundred and sixth Article of War, approved the proceedings, findings and sentence and ordered the sentence to be executed, to take effect February 17, 1899 (R., 8, 9).

Ever since that date the claimant has been able, willing and ready to perform the duties of his rank as First Lieutenant of volunteers, and he has continued to insist that said sentence was illegal, null and void (R., 9).

He received and accepted his commission July 11, 1898,

his residence then being Houston, Texas (R., 7). His term of service was two years unless sooner discharged (30 S. L. 361, 1770, 1772). He rendered honest and faithful service within as well as beyond the limits of the United States.

All the other officers and the non-commissioned officers and enlisted men of his command, Co. I, 9th U. S. V. I., were mustered out on May 25th, 1899, and thereupon he duly applied for an honorable discharge as of that date, with pay and allowances, but his applications were refused by the War Department (R., 9).

He has received no pay or other allowances, excepting only his pay at the rate of $1,500 per annum, as allowed by law, for the period commencing July 2, 1898, and ending February 17, 1899 (R., 9).

In the Court of Claims, on December 17, 1902, he filed his petition (R, 1-3) against the United States, seeking to recover the following:

For pay, since February 17, 1899, .	$5,750.00
For 3 months' extra pay (30 S. L.,784),	375.00
For mileage and allowances for travel, estimated, ...	500.00
Total, ...	$6,625.00

In his petition he denies the jurisdiction of said court martial to try him and contends, upon the grounds therein distinctly stated, that the sentence of dismissal was illegal, null and void.

The Court of Claims, holding that the proceedings of the court martial "were void *ab initio*" and "that there was in fact no court present competent to try the claimant for his alleged offense" (R., 6), decided that he was entitled to pay to and including the date when the other officers and men of his company were mustered out (May 25, 1899), and also to two months extra pay, and entered judgment therefor in his favor against the United States in the sum of

$658.33 (R., 10) from which judgment each party sought and was allowed an appeal (R., 11).

The government by its appeal seeks to establish the validity of the sentence of the court martial. The questions thus involved and hereinafter discussed in the order here stated, are as follows:

I. Was the court martial competent, under the Seventy-seventh Article of War, for the trial of the claimant?

II. Was the action of the court martial, in revoking the acquittal and substituting therefor a conviction and sentence, lawful?

III. If the court martial was authorized under paragraph 957 of the Army Regulations of 1895 to make such substitution, was not the failure to comply with the requirements of said regulation fatal to the validity of the conviction and sentence?

IV. Was the sentence operative without the approval of the President of the United States?

V. Was the omission, from the record, of the entire testimony of one witness, tending to sustain the acquittal, sufficient to invalidate the sentence?

The questions involved in the claimant's appeal and the errors specified on his behalf are stated and discussed in the latter part of this brief.

QUESTIONS INVOLVED IN THE APPEAL OF THE UNITED STATES.

ARGUMENT: POINTS AND AUTHORITIES.

I. TRIAL OF OFFICER OF VOLUNTEER FORCES.

Under the 77th Article of War the court martial was wholly without jurisdiction to try the claimant and its sentence and all its proceedings in his case are utterly null and void.

Articles 77 and 78 (Sec. 1342 R. S. U. S.) read as follows:

"Article 77. Officers of the regular army shall not be competent to sit on courts martial, to try the officers or soldiers of other forces, except as provided in Article 78."

"Article 78. Officers of the Marine Corps, detached for service with the army by order of the President, may be associated with officers of the regular army on courts martial for the trial of an offender belonging to the regular army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present, and duly authorized, shall be obeyed."

General Wood, commanding the department of Santiago, by his order dated November 3, 1898, created a general court martial "for the trial of such officers as may be properly brought before it" (R., 7). He did not name the claimant or otherwise indicate what officers might be "properly" brought before the court.

He designated by name ten officers as members of the court and one more as judge-advocate. Of the ten members only five served (R., 8) and of these five the senior, Lieut. Col. Grubbs, who by virtue of his rank presided, was an officer of the regular army (R., 9). This officer had been a cadet at the U. S. Military Academy; was appointed thence, in 1896, Second Lieutenant in the regular army and as such granted indefinite leave of absence in 1898, to enable him to accept the volunteer commission held by him at the time of the trial; promoted, in September, 1898, to First Lieutenant in the regular army and as such, in January, 1899, after the trial, assigned to the Sixth Infantry of the regular army and mustered out of the volunteer service, in June, 1899 (R., 9).

The claimant, as an officer in the volunteer forces and who had never served in the regular army, was brought before this court for trial. He did not object to Colonel Grubbs as a member of the court, because he did not know then or until May, 1902, that Colonel Grubbs was an officer of the regular army (R., 9). He only knew Colonel

Grubbs as a volunteer officer. He had the right to assume that the 77th Article of War would not be violated or evaded by the designation of a regular army officer, by his temporary title in the volunteer forces, to sit on the trial of an officer of volunteers.

The failure of the claimant to object to Colonel Grubbs was not a waiver of the right to object nor was it an implied consent. Consent will not be implied as against one who is ignorant of the facts, and, furthermore, consent will not give validity to what is contrary to law.

In McClaughry *vs.* Deming, 186 U. S., 49, the accused expressly stated to the court martial that he had no objection to being tried by any member thereof, he well-knowing at that time that each member of the court was a regular army officer, and he thereafter pleaded guilty to the charges against him, whereupon the court passed sentence of dismissal from the service and confinement in the penitentiary, which sentence was confirmed by the President. Yet, when the accused thereafter complained, in *habeas corpus* proceedings, to the civil court that he, as an officer in the volunteer forces, could not lawfully be tried by said court martial because the members thereof were officers in the regular army and that the sentence, being in violation of the 77th Article of War, was void, his contention was sustained. The court said, in reference to the court martial: "This particular court was not legally constituted to perform the functions for which alone it was convened. It was therefore, in law, no court. The men were disqualified to act as members thereof and no challenge was necessary, for there was no court to hear and dispose of the challenge" (p. 65). * * * "His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women" (p. 66).

The contention of the government that the president of the court martial was at the time serving under his com-

mission as an officer of volunteers and not under his commission as an officer in the regular army and that the latter commission was held in abeyance during the period of his service as a volunteer officer, and that therefore he was not disqualified to act as a member of the court to try the claimant, is wholly technical and without merit or reason to sustain it.

It is contrary to the intent of Congress which has specified, in Article 78, one and only one exception to the operation of the 77th Article, viz: That officers of the regular army, when associated on courts martial with officers of the Marine Corps, detached for service with the army by order of the President, shall be competent to act as members of such courts, so constituted, for the trial of offenders belonging to forces of the Marine Corps so detached.

The existence of this single exception and the language employed make it manifest that Congress did not intend that an officer of the Marine Corps should lose his identity as such when detached for service with the army by order of the President. Nor does a regular army officer lose his identity as such when serving under a volunteer commission; but, on the other hand, he retains all his rights, including, among others, the right of promotion, as shown in the case of Lieutenant-Colonel Grubbs. The Act of May 28, 1898, 30 S. L. 421, provides "That officers of the regular army receiving commissions in regiments of engineers, or any other commissions in the volunteer army, shall not be held to vacate their offices in the regular army by accepting the same."

The Article, 77, is prohibitive. The prohibition cannot be evaded by means of volunteer commissions carried by those who are thus in most positive terms declared to be incompetent to sit on a court for the trial of volunteers.

A conclusive argument for the application of Article 77 to the present case and against the Government's contention is found in the reason for the enactment of Article 77,

as stated in the decisions of the Circuit Court of Appeals, 113 Fed. Rep., 639, and of the Supreme Court, 186 U. S., 49, in McClaughry *v.* Deming, and those decisions are adopted *in toto* as part of this brief.

In the latter of those decisions the court said: "The mere fact of a direct enlistment of the volunteers into the service of the United States under the act of 1899 cannot, as we have said, change the essential character of the volunteer army as a different and separate force from that of the regular army." May it not be said with equal force and reason that the mere fact of the appointment in the volunteer service of a regular army officer, while he is on indefinite leave of absence, granted for the sole purpose of enabling him to accept such appointment, cannot change his essential characteristics or remove his disqualifications as an officer of a different and separate force from that of the volunteer army?

Within the true intent of Article 77, as shown by the reason for the enactment, the volunteer commission held by Lieutenant Grubbs of the regular army did not remove his incompetency to sit on the court which tried the claimant.

The 75th Article of War requires that a general court martial shall consist of not less than five officers. The utter disqualification of Colonel Grubbs to sit in the trial of the claimant left only four qualified members, which number was insufficient to form a court or to perform any duty or exercise any powers as a court. Therefore, in this case as in Deming's case, the question of waiver is eliminated as irrelevant "and no challenge was necessary, for there was no court to hear and dispose of the challenge" (186 U. S., 65).

II. Second Jeopardy.

Under the 5th amendment of the Constitution and also under the 102d Article of War and according to the universal opinion of military and civil authorities and the

dictates of reason, the court martial was wholly without jurisdiction to reconsider its findings of not guilty. The complete acquittal, and the sentence based upon such reconsideration are, therefore, illegal and utterly void.

1. The Military Authorities.

The first and most important question is as to the conclusiveness of the findings of not guilty. Upon this point the following authorities on courts martial law, and others on the same subject, have been carefully examined, viz:

Benét, Military Law and Courts Martial, 6th Ed., N. Y., 1868;
Winthrop, Military Law, 2d Ed;
Griffiths, Courts Martial, London, 1841;
Simmons, Courts Martial, London, 1863;
Macomb on Martial Law and Courts Martial, Charleston, S. C., 1809;
McArthur on Courts Martial, London, 1813;
Hough on Courts Martial, London, 1825;
O'Brien on Courts Martial, Philadelphia, 1846;
Harwood, Naval Courts Martial, N. Y., 1867;
Lee, Judge Advocate's Vade Mecum, Richmond, 1864;
Ives, Military Law, N. Y., 1859;
De Hart, Military Law, N. Y., Edinburgh, 1884;
Clode, Military and Martial Law, London, 1872.

There is nothing in any of these works to sustain the contention that a court martial may, on being reconvened, lawfully revoke or reconsider an acquittal, or that it may be reconvened for such purpose, excepting a foot note in Winthrop, at page 696, in these words:

"The court on the revision may so far change the finding as to substitute a conviction for an acquittal, adding thereupon a sentence;" citing Griffiths, 92.

There is nothing else in Winthrop's work to support the proposition or to justify the principle announced in the foot note. The reference to Griffiths does not sustain the foot note, for, upon examination, it appears that in the case referred to, the court was reassembled by virtue of a letter from His Grace the Duke of Wellington, "conveying the commands of His Majesty to revise its former sentence and the grounds on which these commands are given." The court thereupon revised its opinion and sentence and found the prisoner guilty of all the charges. While Griffiths' account is not very complete, it is quite certain that although the court had found the accused not guilty of the charges, it had found him guilty of some of the specifications and of some lesser offenses than those with which he had been specifically charged and had, thereupon, passed sentence upon him.

On the other hand, O'Brien forcibly denies the power in the following language:

"The sentence is not properly any part of the trial. The case has been tried and decided before the court had any right to pass a sentence, which is a consequent on the result of the trial if that trial has gone against the prisoner" (p. 277). "As a consequence of this right of confirming or not confirming the sentence, the custom of war authorizes the singular power in the authority ordering the court, to remit to the members the sentence with the proceedings leading thereto for reconsideration. This power can, it is thought, only be founded on the right of confirming or not confirming the sentence. If this be in truth its foundation, it would follow necessarily that, in case the court acquits the prisoner, the authority ordering the court cannot interfere in the matter. There is no law whatever giving him any shadow of right to disapprove of the finding of the court, except so far as said finding may incidentally apply to his disapproval of the sentence. But in the case supposed there is no sentence on which the approving authority can act, and his main action being thus negatived, all its concomitants fall to the ground. This doctrine seems

not only conformable to the spirit and letter of the article of war (65th), but also in strict consonance with every principle of natural and legal justice. After a prisoner has been solemnly acquitted by a majority of the members of a court martial on oath, it would seem strange and contrary to the spirit of our jurisprudence that he should be again subjected to conviction for precisely the same act and before precisely the same tribunal. It is without analogy in civil jurisprudence" (pp. 277, 278). "It" (the power of ordering revision) "was not intended to invest the approving authority with any right whatever to dictate to the consciences of the court" (p. 278). "It is admitted that cases have occurred where courts have been ordered to revise, not their sentence, but their finding, that finding being not guilty. It is also known that a few other instances of other most objectionable and even illegal proceedings may be found by raking up the records of courts martial. Even if the precedents were more numerous and more generally acquiesced in, it would not settle the question. But when it is remembered that these precedents are few and very generally condemned, the inference seems to be against the practice" (p. 278). "Writers on this subject seem to have overlooked or avoided this question" (p. 279).

The provision of Art. 65 mentioned by O'Brien is that which constitutes Art. 104, regulations of 1895.

Winthrop himself is clearly of the same opinion as O'Brien, notwithstanding the marginal reference on the same page (p. 696) to Griffiths', above mentioned, and at page 389 he says that in the sense of the 102d Article of War, an accused has been tried when he has been duly acquitted, and it is immaterial whether any or what action has been taken on the proceedings by the reviewing officer.

Clode says (p. 138) the functions of the court are terminated by the transmission of the proceedings to the confirming officer.

Cochran says (p. 106): "An acquittal does not require confirmation and cannot be revised." He also says (p. 102) the finding of not guilty will be announced in open court and the prisoner will be released. This is substantially the

same language as that of Winthrop, to the effect that an acquittal is immediately operative without any action whatever by the reviewing authority.

Lee says (p. 165): "An acquittal, even without the judgment of the court thereon, is a bar."

Benét (p. 112) indicates his views by citing 4 Blackstone Comm., 336, as follows; "There hath been, yet, no instance of granting a new trial, where the prisoner was acquitted on the first."

The 104th Article of War provides that, "No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being." The War Department erroneously contends that the word "sentence" is applicable to a judgment of acquittal as well as to a judgment based on a conviction; but there is nothing to justify the contention. Throughout the Articles of War the word *sentence* is used repeatedly and always refers to, or implies, a conviction.

Sentence is the conclusion of law formally pronounced by a criminal court declaring the consequences to a defendant of the fact of guilt, confessed or ascertained by verdict.

21 A. and E. Enc. (1st Ed.) 1066, citing 109 Mass. 323; And. L. Dict; Black's Dict.

2. The Civil Authorities.

All the military authorities above-mentioned who refer to the subject agree that the revisory power of the officer ordering the court, including the power to remit proceedings to the court for reconsideration, is analogous to that possessed by judges of civil courts. Harwood (p. 144) says the procedure is "strictly consonant with the practice of the civil courts." See also Simmons (Sec. 719).

The rule in civil courts as to the conclusiveness of a verdict of not guilty and amendments of verdicts is as follows:

Even where by mistake of the jury, a verdict of acquittal is improperly rendered, it can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted.

1 Bishop Crim. Law, 7th Ed., Sec. 992.

After the jeopardy has attached, the prosecution can take no backward step in the proceedings. Id., Sec. 992.

Verdict of acquittal or conviction is a bar to a second trial though no judgment be upon the verdict.

1 Wharton Crim. Law, 7th Ed., Sec. 540;
3 Id., Sec. 3221;
2 Yerg., 24; 24 Am. Dec., 458;
Ball *v.* U. S., 163 U. S., 662;
Kepner *v.* U. S., 195 U. S., 100.

In the Kepner case, *supra*, the court said: "A person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal" (citing 97 U. S., 509). "The protection is not against the peril of second punishment, but against being again tried for the same offense."

The rule as to amending verdicts is as follows:

The court may amend a verdict in matters of form but not in matters of fact or substance, and where the alteration is merely to fulfill the evident intention of the jury. This applies to a general as well as a special verdict. When acquitted on the merits, the prisoner is immediately set at liberty and is forever free from that accusation.

1 Chitty Crim. Law, 3d Am. Ed., 645, 646, 647, 648.

"If the jury, through mistake, or evident partiality, deliver an improper verdict, the court may, before it is recorded, desire them to reconsider it and recommend an alteration." * * * "But it is considered as bearing too hard on the prisoner, and has been seldom done in modern times, when the decision was in his favor." Id., 647, 648.

This was the rule declared about one hundred years ago, and Perkins adds at p. 647 in a note, (A): "Where a jury returns an informal or insensible verdict, or one that is not responsive to the issue submitted, they may be directed by the court to reconsider it, but in no other case," citing State *v.* Arrington, 2 Murphey, 571. See also 1 Bishop Crim. Proc., Secs. 1004, 1013.

Where the jury returns a verdict which is not responsive to the charge, the judge may refuse to receive it and may direct the jury to retire and bring in a proper verdict, and may inform them as to why the verdict is incomplete or unresponsive, without necessarily suggesting what the verdict shall be.

State *v.* Keasbey, 50 La. Ann., 761; 23 So., 900.

These principles are embodied in Par. 957 of the Army Regulations hereinafter mentioned. See also Winthrop, 696.

3. PARAGRAPH 957, REGULATIONS OF 1895, CONSTRUED.

The foregoing makes it clear that the action of General Wood and of the court martial in attempting to set aside the findings of not guilty is not supported by the writers on military law and the law of courts martial. The authority for such action is not to be found outside of paragraph 957 of the Army Regulations, 1895, which provides as follows:

"When the record of a court exhibits error in preparation, or seemingly erroneous conclusions, the reviewing authority may reconvene the court for a reconsideration of its action, pointing out defects. Should the court concur in the views submitted, it will proceed by amendment to correct its errors, *and may modify or completely change its findings.* A reopening of the case, by calling or recalling witnesses is illegal."

If this was intended to confer the power upon a reviewing officer to remit a case to a court martial to reconsider a

complete and absolute acquittal, and to reconvene a court for such purpose, it is contrary to law and invalid. It is contrary to the Constitution, Fifth Amendment, which provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" and in *ex parte* Lange, 85 U. S. (18 Wall.), 163, the court said: "It is not necessary to insist that other cases besides those involving life or limb are positively covered by the language of this amendment. * * * It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection."

If so intended, it is also contrary to the spirit if not the terms of the 102d Article of War, which provides that:

"No person shall be tried a second time for the same offense."

The exercise of such power would permit far greater injustice than second jeopardy before another jury, because, in the latter case, the accused may be heard again and face his accuser; but in the former case, he cannot be heard, but may be at the mercy of a court moved only by fear of an arbitrary and despotic superior officer.

So much of said paragraph 957 as provides that a court martial, on being reconvened, "may modify or completely change its findings," must be so construed as not to conflict with existing law and the spirit of the constitutional guarantee. Winthrop's construction of it is thus stated (p. 696): "In a case of acquittal it is no more than just that an error in form or substance should be caused to be corrected in order that the record may go on file so perfected that the accused will be fully sustained by it in the event of a subsequent plea of *autrefois acquit*."

In Ford *v.* State, 12 Md., 546, and also in Burk *v.* Comm., 5 J. J. Mar., 675, cited by the court in the mandamus proceedings instituted by the claimant (28 W. L. R. 787), the verdict was found to be manifestly improper, not

by review of the evidence, but upon the face of the verdict itself. Those cases come within the rule laid down by Chitty and Bishop (*supra*) distinguishing between matters of form and matters of fact or substance. And in each of those cases the court said that the verdict would have been *beyond alteration if it had been recorded.* In Ford's case (for murder) the Court of Appeals set aside the judgment because the verdict as recorded was not the verdict which the jury had returned. The verdict as returned was not in conformity with the statute, and the clerk, on the following day, in the absence of the defendant and after the jury had been discharged, undertook to make such conformity by an additional entry which was contrary to the facts. In Burk's case (which was only *quasi criminal*) the appellate court affirmed the action of the trial court in admitting further testimony of a witness who had been previously examined, after the jury had delivered an informal and irregular verdict but before such verdict had been recorded, and it never was recorded.

The Government contends that the regulation, par. 957, has the force of law and relies upon Swaim *v.* U. S., 165 U. S., 553, 565, and *Ex parte* Reed, 100 U. S., 13. The answer is, that in no case has that paragraph been construed to confer the power to reverse an *absolute and unqualified acquittal*, as was done in the case at bar. General Swaim was never acquitted. The court found him guilty of certain offenses but not of the specific charge, and pronounced a sentence, which, under the express terms of the 104th Article of War, was inoperative until approved. On reconsideration the court changed the sentence. The decision of the Supreme Court goes no further in this connection than as set forth in the syllabus, viz: "The action of the President in twice returning proceedings to a court martial, urging a more severe sentence, is justified by the Army Regulations of 1881." The question was merely as to the adequacy of punishment. The decision of the court

in that case can never be extended in reason to a case like that at bar, in which the question of guilt or innocence was settled at the outset by a complete and unqualified acquittal. This also applies to Reed's case, in which the accused was found guilty and sentenced and the admiral, raising the question of adequacy of punishment, sent the record back and a different and more severe sentence was imposed and executed.

Paragraph 957 does not purport to give, nor should it be construed as giving, authority to recommit a case to a court martial for reconsideration of findings of not guilty whereby the accused is wholly acquitted of every offense charged against him after a trial on the merits.

The power to recommit for reconsideration under said paragraph 957 should not be so construed as to permit a commanding officer to interfere with the judicial functions of the members of a court martial, and particularly in the determination of the question of innocence or guilt, after the court has decided all matters of fact and found and adjudged in favor of the accused.

The paragraph 957 is illegal, unconstitutional and void, in so far as, if at all, it purports, or was intended by the President, to confer upon a commanding officer the extraordinary and dangerous power to impose upon the members of a court martial his views as to the guilt or innocence of the accused, either before or after a trial upon the merits, and especially after such trial and a complete acquittal, and to interfere by an order or even a bare suggestion with the free exercise of their consciences by his subordinate officers composing the court, touching the question of the guilt or innocence of the accused, in the discharge of their judicial functions under the obligation of an oath—he being under no such obligation and not a member of the court.

But the attempt of the Government to assert that Par. 957 has the force of law and to give it an interpretation and application contrary to the Fifth Amendment and to the

102d Article of War enacted by Congress, is met by the declaration of the Supreme Court that a regulation prescribed by one of the Executive Departments, even though approved by the President, is void if in conflict with an act of Congress. In U. S. *v.* Symonds, 120 U. S., 50, the court said:

"The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with Gratiot *v.* U. S., 45 U. S. (4 How.), 80, and *Ex parte* Reed, 100 U. S., 13, upon which the Government relies. Referring in the first case to certain army regulations and in the other to certain navy regulations which had been approved by Congress, the court observed that they had the force of law. See also Smith *v.* Whitney, 116 U. S., 181. In neither case, however, was it held that such regulations, when in conflict with the Acts of Congress, could be upheld."

"The court will not permit the practice of an Executive Department to defeat the obvious purpose of a statute."

Webster *v.* Luther, 163 U. S., 331, 342.

"It is only in cases of doubt that the construction given to an Act by the department charged with the duty of enforcing it becomes material."

U. S. *v.* Tanner, 147 U. S., 661, 663.

Notwithstanding Par. 957, the court had no power, either with or without General Wood's order, to alter its findings of not guilty, after the same were recorded and particularly after the record had passed from the control of the court

and the members of the court had separated. The contention that the subsequent proceedings were part of the original trial is an attempt to evade the spirit and intent of the 102d Article of War. The original trial ended finally with the acquittal.

4. The 5th Amendment.

The War Department strenuously contends that the Fifth Amendment of the Constitution has been held not to apply to court martial trials. In the mandamus proceedings whereby the claimant unsuccessfully sought to be mustered out with the other officers of his command (U. S. *ex rel.* Brown *v.* Root, 18 App. D. C., 239, affirming 28 W. L. R. 787) the only cases cited in support of that contention for the respondent were as follows:

Ex parte Milligan, 4 Wallace, 2;
In re Bogart, 2 Sawyer, 396; 3 Fed. Cases, 796;
Dynes *v.* Hoover, 20 How., 65;
In re Esmond, 5 Mackey, 64;
Callan *v.* Wilson, 127 U. S., 540.

These cases wholly fail to support the proposition. Bogart's, Dynes' and Esmond's were the only cases among them which involved the powers or procedure of courts martial, and Esmond's case was the only one of them which involved the question of second jeopardy under the Fifth Amendment. Milligan's case involved the validity of the sentence of a military commission and Callan's case involved the validity of the sentence of the police court of the District of Columbia.

In Callan's case the Supreme Court held that he was entitled, on *habeas corpus*, to his discharge from custody, because it appeared that he had been adjudged guilty of an infamous crime, to wit, conspiracy, without ever having been tried by a jury, and in violation of his constitutional rights.

In Milligan's case the Supreme Court said that the controlling question was whether the military commission had jurisdiction legally to try and sentence him, and the court decided this in the negative.

Bogart's case was on *habeas corpus* to obtain his discharge from custody, he being held for trial by a naval court martial. He had not been tried.

Dynes' case was an action for false imprisonment, in which the defendant justified by showing that the imprisonment was in execution of the sentence of a naval court martial. Upon the charge of desertion the court martial had found him guilty of the specification, and "of the charge not guilty of deserting, but guilty of attempting to desert." Upon these findings the sentence of imprisonment was based. His main contention in the civil court was that "the finding was *coram non judice*, it being for an offense of which the plaintiff was never charged and of which the court had no cognizance," but the court, in accordance with the authorities, overruled this contention.

In Esmond's case the question was whether his trial and acquittal in the Supreme Court of the District of Columbia, on a charge of larceny, was a bar to his subsequent trial and conviction by court martial under the 62d Article of War, he being at the time in the military service, and on this point the court held "that a trial by civil court of an act which has military as well as civil relations, is not a bar to a subsequent trial by court martial."

In these five cases Esmond's is the only case in which the question of second jeopardy under the Fifth Amendment arose. The court sustained the proceedings of the court martial upon the ground "that larceny committed *against the peace and Government of the United States*, and larceny committed *to the prejudice of good order and military discipline*, were not in a legal sense, and therefore were not within the meaning of the prohibitory clause of the Fifth Amendment, *the same offense*," thus conceding the application of the second jeopardy clause to court martial cases.

The only other reference to the Fifth Amendment in these cases is in connection with the first clause thereof. In Milligan's case Chief Justice Chase, for himself and three other justices, referring to the power of Congress to make rules for the government of the army and navy, said it was a power to provide for trial and punishment by military courts without a jury, and added, "nor, in our judgment, does the fifth, or any other Amendment, abridge that power. 'Cases arising in the land or naval forces, or in the militia in actual service in time of war or public danger,' are expressly excepted from the Fifth Amendment 'that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' and it is admitted that the exception applies to other Amendments as well as to the Fifth." In Bogart's case and elsewhere this language has erroneously been quoted as the language of the Supreme Court. The opinion of the court in Milligan's case was delivered by Mr. Justice Davis, but the language quoted does not even remotely bear upon the question of second jeopardy; it must be limited in its application to the subject-matter of inquiry in that case, to wit, the power of Congress to make rules for the government of the Army and Navy. The Chief Justice, evidently referring to the whole court, said: "We agree in the proposition that no department of the Government of the United States—neither President, nor Congress, nor the courts— possess any power not given by the Constitution."

The inevitable result of the contention made by the War Department, if sustained, would be to deny to all persons in the land and naval forces the benefit, not only of the prohibition against second jeopardy for the same offense, but also of the provision that no person shall be compelled to testify against himself in a criminal case nor be deprived of life, liberty, or property without due process of law. The language used by Chief Justice Chase in Milligan's case was

never intended by him, nor has it ever been understood by lawyers generally, to bear such interpretation as that now given to it by the War Department.

The efforts of the Department to establish a system of procedure which shall not be subject to constitutional limitations have met with no judicial encouragement. These efforts can be found in a long line of cases. One of the latest of these is Carter *v.* McClaughry, 183 U. S., 365, 388, in which the Government strenuously contended that the 5th Amendment is not applicable in proceedings by court martial and that the question of second jeopardy in such proceedings can only be raised under the 102d Article of War. The court held that the Amendment, if applicable, was not violated in that case, but did not decide the question of its applicability (p. 390).

III. Failure to comply with Par. 957, Army Regulations.

It appears (R., 10) that on December 1, the acting judge-advocate, at headquarters, had the record of the case before him and disagreed with the court martial on the effect of the evidence and considered the same "conclusive as to the guilt of the accused." He recommended reconsideration by the court of its finding.

On the same day General Wood caused the record to be returned to the court for reconsideration with an endorsement thereon (R., 8) to that effect, but without "pointing out defects" as required by paragraph 957, nor does it appear that he found that the record exhibited "error in preparation or seemingly erroneous conclusions." He did not adopt the acting judge-advocate's recommendation and views nor did he even refer thereto, and it does not appear that they were ever made known to the court (R., 10). The court on December 6, therefore, acted merely upon General Wood's order for reconsideration, which action on his part and on the part of the court was not authorized by the Regulations.

Furthermore the power of review vested in General Wood could not be delegated.

U. S. *v.* Page, 137 U. S., 673, 678, 680;
Runkle *v.* U. S., 122 U. S., 543;
11 Op. Att'y Gen., 21.

In reviewing the proceedings he was required to act personally. He cannot delegate his authority, and if he assume to do so the acts of his delegate will be of no legal virtue.

Winthrop, p. 687.

Unless it appear otherwise than argumentatively that the findings of not guilty, and the acquittal were laid before General Wood and were by him personally considered and disapproved, they must be regarded as the last lawful action by the court in reference thereto, under said par. 957.

Runkle *v.* U. S., 122 U. S., 548.

Winthrop regards the Runkle case above cited to be overruled by United States *v.* Fletcher, 148 U. S., 84, and United States *v.* Page, 137 U. S., 673, but in this he is greatly mistaken. In each of those cases it was apparent on the face of the record that the proceedings had been laid before the President and that he had personally considered and approved the same. In the Page case the Supreme Court said: "The only possible conclusion from such statement (referring to the record) is that the approval was by the President, in whom alone was reposed the authority to act." And in commenting on the Runkle case the court added: "The record failed to show the vital fact of the submission of the proceedings to the President."

These cases of Fletcher and Page follow and confirm the principle, laid down in Runkle's case, that it must affirmatively appear, not argumentatively, but by express statement of fact, that the proceedings had been by the reviewing authority personally considered and acted on by him, and as stated in the Page case, this is a "vital fact."

The decision in the Runkle case has never been disturbed

and it is reasserted fully and without reserve in McClaughry *v.* Deming, *supra.*

The record in this case does not show, affirmatively, that General Wood ever personally considered or acted upon the case until December 24, 1898, and he then approved the findings and sentence without ever disapproving anything in the record.

The first endorsement is merely the opinion of the Judge Advocate of General Wood's department, which does not appear to have been considered by the court martial, and is not properly a part of the record. The second endorsement is in effect merely a command to the court to reconsider without stating what should be reconsidered. It is evident that General Wood attempted to delegate his discretionary power, whether judicial or otherwise, to his judge advocate and adjutant general, or that the latter wrongfully assumed such power, and that the court reconvened and revoked its former findings and passed sentence before General Wood ever saw the record or considered the matters involved. This action of the court was therefore unauthorized and illegal and void.

The penalty for the violation of the 61st Article of War is fixed by law, and the act of the court in passing sentence after a pretense of finding the accused guilty of the charge, was merely ministerial, involving no discretionary powers.

IV. Sentence not approved by the President.

The sentence of the court martial has never been confirmed by the President, as required by the Articles of War.

"Art. 106. In time of peace no sentence of a court martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President."

War with Spain commenced April 21, 1898. Hostilities were suspended August 12, 1898. Treaty of peace signed December 10, 1898, ratified February 6, 1899, by the Presi-

dent, as advised by the Senate, and ratification proclaimed by the President April 11, 1899.

30 S. L., 364, 1742, 1780, 1754.

The date of the alleged offense was October 11, 1898 (R., 8), which was after hostilities were suspended.

The sentence was not approved by General Wood until December 24, 1898 (R., 8), which was after the treaty of peace had been signed and his order of February 15, 1899, for execution of the sentence, was after the treaty was ratified by the President.

The President of the United States, by and with the advice and consent of the Senate, had duly appointed the claimant to his office of First Lieutenant. It is not to be presumed that Congress intended by the 106th Article of War to permit such an appointment to be vacated without the approval of the President, and even without his knowledge, except during the continuance of hostilities. Article 106 was intended to enable a commanding officer to meet emergencies in the field during actual, not merely technical war. The term "time of peace," as employed in Article 106, is fairly and in reason applicable in this case to the whole period subsequent to the suspension of hostilities on August 12, 1898 (30 S. L., 1780); certainly after February 6, 1899, when the treaty was ratified by the President.

The question is not one which merely involves individual rights; it involves also the prerogatives of the President of the United States, Commander-in-Chief of the Army and Navy, and the right of the Government to the services of an officer.

V. Impeachment of the Court Martial Record.

In the Court of Claims the claimant established his contention that a material and essential portion of the proceedings had been omitted from the court martial record. Although this does not appear in the formal findings of fact,

it is thus stated in the opinion of the court (R., 4, par. 4); "It also appears that the record of the court martial upon which the case was considered by the commanding general was attacked collaterally, it being shown *aliunde* the record that the testimony of a witness, who was summoned, sworn, and examined before the court as a witness for the accused, and whose testimony tended to prove the accused innocent of the charge and specification, was wholly omitted from the record."

The Army Regulation, Par. 954, requires every court martial to keep a complete and accurate record of its proceedings, to be authenticated by the signatures of the president and judge-advocate. This regulation is not contrary to any statute and has the force of law.

Such a record was not made in the case of the claimant. The only paper purporting to be the record of his trial is a record of a part, only, of the proceedings in his case. It wholly omits the testimony of Sergeant Hall and by reason of this omission the judge-advocate at headquarters (R., 10) was misled. Upon the false record laid before him he considered the acquittal to be against the weight of the evidence and for that reason, only, he recommended that the finding of not guilty be reconsidered. Had Sergeant Hall's testimony been recorded, the judge-advocate would have found four witnesses for the prosecution and four for the defense.

The omission, whether intentional suppression of evidence or mere inadvertence, was a fraud upon the Government and upon the accused.

The paper certified as the record and sent to General Wood was not the record required by the regulations (pars. 954, 955). It was a false, fictitious and fraudulent document.

It was upon this false and fraudulent document, purporting to be a record of his trial, that all the proceedings after the acquittal were based, viz: The recommendation for the

court to reconsider, the order of General Wood for reconsideration, the reconsideration itself, and the conviction and sentence, and the order of General Wood directing the sentence to be carried into execution. These proceedings are voidable as procured by fraud either actual or constructive.

The proceedings of any court may be impeached for fraud or for want of jurisdiction.

"Although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act which vitiates the most solemn proceedings of courts of justice." In such case the whole proceeding is *fabula non judicium.* This principle applies to every species of judgments—even to judgments of the House of Lords.

2 Best Evid., Sec. 595, citing Duchess of Kingston's case, 11 St. Tr., 262.

The doctrine imputing absolute verity to a judicial record is subject to various exceptions. In Starbuck *v.* Murray, 5 Wend., 156, the court said: "For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and therefore, the supposed record is no record."

"A departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose."

Windsor *v.* McVeigh, 93 U. S., 274.

The deviation by a court martial from the statute or from the regulations prescribing the manner of its procedure may render the case *coram non judice.* In such case the proceedings are not merely voidable but void.

Dynes *v.* Hoover, 61 U. S., 65.

The sentence in such a case, as stated by Mr. Attorney-General Cushing, "gives no right, it bars no right, it binds nobody and all concerned in executing such a sentence are trespassers."

6 Op., 506, June 5, 1854;
Wise *v.* Withers, 3 Cr., 331;
Winthrop, 1173.

The Secretary of War may cancel an honorable discharge which was obtained from the department by falsehood and perjury.

16 Op. Att'y Gen., 349, May 27, 1879.

That being so, he surely may cancel a dishonorable discharge which was obtained by the same or like means.

The department takes the position that after the reviewing authority has acted in a case it is too late to urge that the sentence is invalid on account of weight of evidence, etc. If that were the question now the answer would be that the claimant had no opportunity to know what was in the record until *after* the reviewing authority had acted.

The question now is this: Where there is fraud, actual or constructive, in making up a record, so that by the omission of certain evidence therefrom it is made to appear that the findings are contrary to the weight of evidence, and thus bringing about a reconsideration of such findings to the prejudice of the accused, whether or not such fraud can be inquired into and its evil consequences remedied?

The omission was, at the very least, a gross irregularity and sufficient as such, under the authorities hereinbefore cited, to avoid the sentence, and in view of the serious nature and consequences of the irregularity itself it is a monstrous thing to say that there is no redress for the injured party.

The Government's contention that the record imports

absolute verity and is conclusive upon all parties should not be sustained without a careful inquiry as to what it would lead to. "The 'bearings' of the proposition 'lie in the application of it.'"

If the contention be correct, it would not be competent for the claimant to show by matter *dehors* the record that the members of the court martial were officers of the regular army, or that they were civilians, and that the court was created and organized in most flagrant violation of law.

The court martial was dissolved long ago, even before the claimant knew it had reconsidered the acquittal. He was not informed of it until the order of February 15, 1899, was issued.

He was brought into court and faced his accusers and prevailed. By the omission of testimony favorable to him the false record brought about an order for reconsideration. That reconsideration was nothing more nor less than a surrender by the members of the court of their own official responsibilities and the adoption by them of the views of the commanding officer, who knew nothing of the merits of the case except what he may have learned from the incomplete and false record. If it was not that, then it was a second trial, contrary to the constitution and to the 102d Article of War and without the presence or knowledge of the accused.

Under the circumstances the court was without jurisdiction to convict him and pronounce sentence.

VI. Sentence Subject to Collateral Attack; No Presumptions in its Favor.

It must appear, either by the record or by presumption of law, that the court had not only jurisdiction of the parties and the subject-matter, but also jurisdiction to render

that particular judgment; otherwise the judgment is void and may be questioned collaterally.

U. S. *v.* Walker, 109 U. S., 258;
Ex parte Nielson, 131 U. S., 176;
12 A. & E. Enc., 147, note 3, *Id.*, 246 to 249;
Elliot *v.* Piersol, 1 Pet., 328, 340;
Thompson *v.* Whitman, 85 U. S., 457.

There is no such presumption in favor of the judgment of a court martial. As stated by Mr. Chief Justice Waite:

"A court martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev., Sec. 470; 11 Pick., 442; 19 Johns., 7, 30; 3 Serg. & R., 590, 599. Such also is the effect of the decision of this court in Wise *v.* Withers, 7 U. S., 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte* Watkins, 28 U. S., 3 Pet., 193, 207, ranked a court martial as one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with and that its sentence was conformable to law. 61 U. S., 20 How., 65, 80; 19 Johns, 33. There are no presumptions in its favor so far as these matters are concerned."

Runkle *v.* U. S., 122 U. S., 543.

A judgment invalid for want of jurisdiction is absolutely void, and the person against whom it is rendered is under no obligation to take any direct steps for its cancellation.

Tenny *v.* Taylor, 1 App. D. C., 223, 227, citing 8 How., 495; 11 How., 437; 18 Wall, 457; 93 U. S., 274; 109 U. S., 258.

The power in the court to pronounce, and in General Wood to execute, the sentence, not appearing on the face of the record, but the contrary being manifest, the sentence is void. It is not binding upon the accused, the Secretary of War, or any other person. "An officer is not justified in obeying the order of a judge or court having no jurisdiction in the matter."

Duncan *v.* Darst, 1 How., 301, 308;
Elliott *v.* Piersol, 1 Peters, 328, 340;
Wise *v.* Withers, 3 Cr., 331;
Winthrop, 1173;
Dynes *v.* Hoover, 61 U. S., 65;
6 Op. Att'y Gen., 506;
3 Op. Att'y Gen., 396.

VII. The claimant adopts as part of this brief the entire opinion of the Court of Claims, excepting only the last paragraph thereof (R., 6).

The learned Chief Justice, in his statement that "This case comes into court with a record which is not creditable to the administration of military justice" (R., 4), uttered a well-deserved criticism from the standpoint of a good soldier as well as an eminent jurist.

QUESTIONS INVOLVED IN THE APPEAL OF THE CLAIMANT.

Specification of Errors.

The Claimant is advised that the Court of Claims erred as follows:

1. In holding that the muster out of the regiment "was the dissolution of the regiment and of every office in and connected with it" (R., 6) and in denying to the claimant his pay as First Lieutenant at $1,500 per annum from and after May 25, 1899, to and including July 11, 1900.

2. In denying to the claimant one month's extra pay for

service within the limits of the United States, in addition to the two months' extra pay allowed by the court.

3. In failing to determine the place where the claimant's constructive discharge was effected and in denying to him allowances for travel therefrom or else from San Luis, Cuba, to Houston, Texas.

Argument: Points and Authorities.

I.

The Finding VII (R., 9) as to the muster out of the claimant's company is a conclusion of law rather than a finding of fact. If the claimant has ever been mustered out it was constructively, by operation of law, only, and the time and place thereof are to be determined as matter of law and not of fact.

The terms of the statute, January 12, 1899, 30 S. L. 784, providing that the discharge of volunteer officers shall, "as far as practicable, take effect on the date of the muster out of the organization to which they belong," permit the President to discharge a volunteer officer before or after the muster out of his regiment. The words, "as far as practicable," confer upon the President the power to retain a volunteer officer in service after the muster out of his regiment. The muster out of the regiment, therefore, did not *ipso facto* dissolve or terminate the claimant's office.

By the terms of that statute the power to determine when it was "practicable" to muster out the claimant was vested in the President. The court had the power to determine, as it has done, that the claimant was not discharged or dismissed by virtue of the court martial proceedings, but it was without jurisdiction to order his discharge or to decide when it was "practicable" for him to be discharged.

The President, possessing exclusively the power to discharge the claimant and to determine when it was practi-

cable for such discharge to take effect, has, through the War Department, not only failed but refused to exercise that power.

The refusal to discharge the claimant as of the date of the muster out of the regiment was based upon the ground, as alleged by the Department, that he was already out of the service by reason of the sentence of the court martial. The government has thus elected, irrevocably, to stand by the court martial proceedings and should not now be heard to say that the claimant was in any way affected by the muster out of the regiment.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Ohio, etc., Ry. Co. *v.* McCarthy, 96 U. S., 258.
7 A. & E. Enc. (1st Ed.) 22, 23, notes.

The sentence of the court martial was a nullity. Consequently the sentence and the order purporting to carry it into execution in no way affected the claimant's status as First Lieutenant of Volunteers, nor has his status been affected by any subsequent act of the President or of the War Department.

The question then presented is whether or not the claimant has been constructively or by operation of law, discharged or mustered out from the service; and if so, how and by what means, when and where?

The record does not furnish an answer to this question but the court may take notice of the following:

By Joint Resolution, April 20, 1898, Congress made demand on Spain to withdraw from Cuba and directed and empowered the President to call into service and to use the volunteer force "to such extent as may be necessary" to carry the resolution into effect (30 S. L., 738, 739).

The Act of April 22, 1898, to provide for temporarily increasing the military establishment in time of war, etc., (30 S. L., 361, Chap. 187) provides that the volunteer army shall be maintained only during the existence of war or while war is imminent and that all enlistments "shall be for a term of two years unless sooner terminated, and that all officers and men composing said army shall be discharged from the service of the United States when the purposes for which they were called into service shall have been accomplished, or on the conclusion of hostilities" (Sec. 4).

That Statute was followed immediately by the President's proclamation of April 23, 1898, calling for volunteers and later by his proclamation of May 25, 1898, calling for additional volunteers. Each of these proclamations stated that such volunteers were "to serve for two years unless sooner discharged" (30 S. L., 1770, 1772).

In response to these calls the claimant joined his company at Houston, Texas, June 25, 1898. He received and accepted his commission at New Orleans, July 11, 1898 (R., 7).

The Act of January 12, 1899 (30 S. L., 784, chap. 46), extended by the Act of May 26, 1900 (31 S. L., 217, chap. 586) provides that the muster out of volunteer officers "shall, as far as practicable, take effect on the date of the muster out of the organization to which they belong."

The Act of March 2, 1899, (30 S. L., 977, chap. 352), provided for the continuance of the volunteer force in service until July 1, 1901 (Secs. 12, 15).

The Act of March 3, 1899 (30 S. L., 1064, chap. 423), appropriated money to pay officers of volunteers until June 30, 1900, and contains these words: "Provided, That the provisions of this Act shall apply for the payment of Volunteers as fully as though they formed part of the Regular Army" (p. 1074).

April 11, 1899, the President proclaimed the ratification of the treaty of peace with Spain (30 S. L., 1754) and on

May 25, 1899, all the officers and men of claimant's regiment excepting only himself, were mustered out of the service of the United States. The War Department not only omitted, but expressly refused upon his application, to muster him out or discharge him as of that date (R., 9).

The Act of February 2, 1901 (31 S. L., 748, chap. 192), provided for the reorganization of the army from and after that date.

The right of a volunteer officer, when honorably discharged, to a certificate of such discharge, is recognized by statute. R. S. U. S., Sec. 282; Act of July 1, 1902, chap. 1353, 32 S. L., 629.

II.

Upon the above showing and upon the whole record it appears as follows:

1. That the claimant's office was not a permanent one but was created by law for a special purpose which has been accomplished.

2. That the treaty of peace or its promulgation did not terminate said office; because after the treaty was signed and ratified (Feby. 6, 1899) Congress provided for the continuance of the volunteers in service until July 1, 1901 (Act of Mch. 2, 1899), and made appropriation for the entire volunteer force until June 30, 1901, and it was not until Feby. 2, 1901, that Congress, by the reorganization statute, eliminated the volunteer force.

3. That by the terms of the Act of Jany. 12, 1899, it was left to the President to determine, in his own discretion, when it would be "practicable" to muster out the claimant (who was then in actual service) without reference to the date of the muster out of his regiment. The President has never acted in that respect but, through the War Department, evidenced his determination that it was not "practicable" to muster out the claimant on May 25, 1899, when

his regiment was mustered out. Claimant's request for muster out as of that date was refused by the Department.

4. As the court is without jurisdiction to determine the question as to when it was "practicable" to muster out the claimant and as it has never been determined by the President, otherwise than by his proclamations, it seems very clear that the Act of April 22, 1898, and the terms of the proclamations stating that the volunteers were "to serve for two years unless sooner discharged" answer the question as to *how* and *when* the claimant's office terminated by operation of law.

5. Claimant received and accepted his commission July 11, 1898. His term of service fixed by law and by proclamation was two years ending July 11, 1900, unless sooner discharged and he never was discharged in fact. He is therefore entitled to be mustered out and to an honorable discharge as of July 11, 1900.

6. As he has been, after "honest and faithful" service informally, by operation of law, mustered out and discharged he is entitled, under the Act of January 12, 1899, (30 S. L., 784) to two months' extra pay for service "beyond the limits of the United States" and also to one month's extra pay for service "within the limits of the United States." The terms of that Act are "That in lieu of granting leave of absence and furloughs to officers and enlisted men belonging to companies and regiments of United States Volunteers prior to muster out of the service, all officers and enlisted men belonging to volunteer organizations hereafter mustered out of the service who have served honestly and faithfully beyond the limits of the United States shall be paid two months' extra pay on muster out and discharge from the service, and all officers and enlisted men belonging to organizations hereafter mustered out of the service who have served honestly and faithfully within the limits of the United States shall be paid

one month's extra pay on muster out and discharge from the service, from any money in the Treasury not otherwise appropriated." The claimant was not granted leave or furlough.

7. The place where claimant was so discharged from the service must be determined in order to ascertain the amount due him for travel allowances. The Act of May 26, 1900, "Making appropriation for the support of the Regular and Volunteer Army for the fiscal year ending June thirtieth, Nineteen hundred and one" provides, "That hereafter when an officer shall be discharged from the service, except by way of punishment for an offense, he shall receive for travel allowances from the place of his discharge to the place of his residence at the time of his appointment or to the place of his original muster into the service, four cents per mile," excepting sea travel, for which actual expenses only are allowed (31 S. L., 210).

He was at Songo, near Santiago de Cuba when he received the order declaring him dismissed from the service (Rec., 9). That order being illegal and void, and inoperative to affect his legal status or rank as an officer, was so far executed as to leave him at Songo without duty, and a few days later he was furnished at headquarters with a pass on a transport which brought him from Santiago to New York City, which should be regarded as the place where he was constructively discharged at the expiration of his two years' term of service, July 11, 1900.

The distance from New York City to Houston, Texas, where he resided at the time of his appointment, is 1,733 miles, according to the records of the Paymaster-General's Office.

III.

The claimant is therefore entitled to recover the following, viz:

Pay as first lieutenant, not mounted, at $1,500 per annum, for 1 year, 4 months and 24 days, commencing February 18, 1899, and ending July 11, 1900, ...	$2,100.00
Extra pay, 3 months, ...	375.00
Travel allowances New York to Houston, 1,733 miles, at 4 cents per mile, ...	69.32
Total, ...	$2,544.32

Respectfully submitted,

LORENZO A. BAILEY,
W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Claimant.

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Supreme Court of the United States.

October Term, 1906.

THE UNITED STATES, *Appellant*,
v.
LEWIS E. BROWN, } No. 283.

LEWIS E. BROWN, *Appellant*,
v.
THE UNITED STATES. } No. 284.

(20,240 and 20,241.)

REPLY BRIEF ON BEHALF OF LEWIS E. BROWN.

Replying to certain portions of the brief on behalf of the United States, counsel for the claimant, Lewis E. Brown, submit the following:

1. The statement at p. 2 (bottom), that the regiment "was mustered out by order of the President" on May 25, 1899, implies an order dissolving the entire regiment and terminating the existence of that organization. This is misleading. The record does not show any order for the muster out of the regiment in whole or in part.

An order of the President may be presumed as to the muster out of all those who were in fact mustered out, but not as to the claimant, who was not among those mustered out. On the contrary, the War Department, acting presumably for the President, expressly refused to muster out the claimant.

2. The argument, at pp. 5 to 27 inclusive, is in support of Benét's proposition that "Regular officers detailed, and sitting, as volunteer officers of higher grades, may try volunteers, but only when holding commissions in the volunteer service."

That proposition is found in the 6th edition of Benét, published in 1868, wherein the full text of the Articles of War then in force is set forth (pp. 391–413). Article 97 then required that courts martial for the trial of officers of militia should be "composed entirely of militia officers," but did not in terms declare officers of the regular army incompetent. That declaration was inserted in the revision of 1874.

There is, therefore, no cause for the alarm expressed at p. 27. The contention of the claimant does not involve Article 97 as it stood prior to 1874.

3. The statement at p. 32, that the affirmance of the decision of the Court of Claims " will invalidate a vast number of sentences imposed by courts martial similarly constituted " and " will be productive of unspeakable confusion and chaos, and serve no good purpose," is an extraordinary application for judicial repeal of the statutory provision known as the 77th Article of War; or else it rests upon the theory that repeated violations of a statute may operate eventually to obliterate or nullify it, and that the supine submission of other victims of such illegal practices has operated to deprive the claimant of his rights under an Act of Congress.

4. At pp. 34 and 37 (bottom) the learned counsel contend that "action by the commanding officer was a part of the proceedings which constituted the trial of the accused;" referring to such action after, and concerning, the acquittal. But counsel fail to explain why these subsequent proceedings, including not only the action of the commanding officer, in the absence of the accused and every member of the court, but also the action of the members of the court

martial when they met on December 6 and in open court read the order for reconsideration, if part of the trial, were had in the absence of the accused and without notice to him.

Benét says (p. 170): "When a court is reconvened for a substantial amendment, the reconvening order should be spread upon the record, which should also show that at least five members of the court, the judge advocate, *and the accused*, were present, and that the amendment was then made to conform to, and express, the truth in the case. But a merely clerical error may be amended by the court without having the accused present."

Such action by the court, in the absence of the accused, was "a departure from established modes of procedure," and therefore "invalid for any purpose."

Windsor *v.* McVeigh, 93 U. S., 274.
Dynes *v.* Hoover, 61 U. S., 65.

5. The statements at p. 35 (bottom) and p. 50, as to the indorsement, are qualified by the finding of the Court of Claims (R., 10) that "It does not affirmatively appear that this indorsement was read to the court martial." All that was read to or considered by the court was the order for reconsideration, as appears in Finding III (R., 8).

6. The suggestion at p. 41, as to a "quotation" from Clode, is uncalled for. In our brief for the claimant (p. 11, bottom) we did not quote Clode, but merely stated the substance of his opinion.

7. The statement at p. 54, that by the Act of March 2, 1899, Congress put an end to the volunteer force, is incomplete without the further statement that Sections 12 and 13 of the Act provided for the continuance of the volunteer force until July 1, 1901 (30 S. L., 980, 981).

8. At p. 55 counsel admit that an officer "held under military control and discipline by competent authority" was "retained" in the service.

"Ever since February 17, 1899, the claimant has been able, willing and ready to perform the duties of his rank as first lieutenant" (R., 9, bottom). If at any time before he was mustered out by operation of law the War Department had seen fit to acknowledge the invalidity of the sentence of dismissal it could and would have issued orders to him, and his own contention as to the invalidity of the sentence kept him subject to such orders. The fact that the acknowledgment by the War Department of the invalidity of the sentence has been postponed until such acknowledgment be required under the judgment of this court, merely indicates that the Department failed to exercise the "military control and discipline" under which the claimant was held since the muster out of the other officers of his regiment.

9. As to the statement, at p. 55, that the claimant contends that the War Department "possesses exclusively the power to discharge the claimant," we refer to our original brief (pp. 32, 33) where a correct statement of our contention will be found. The power referred to was, by Congress, vested in the President, who acts in the matter through the War Department.

Respectfully submitted,

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L. T. MICHENER,
Attorneys for Claimant.

Supreme Court of the United States.

Nos. 283 and 284.—October Term, 1906.

283. The United States, Appellant,
vs.
Lewis E. Brown.

284. Lewis E. Brown, Appellant,
vs.
The United States.

} Appeals from the Court of Claims.

[May 13, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a claim for pay as first lieutenant of United States Volunteers after February 17, 1899, on which date by the sentence of a court-martial the claimant was dismissed from the service. The court-martial consisted of five members, the minimum number by the 75th and 79th Articles of War, Rev. Sts. § 1342, and the president of the court was an officer in the Regular Army. By Article 77 "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78." (Article 78 has no bearing on the case.) On this ground it is contended that the proceedings were void. Even if the presence of an incompetent person as a member would not have made the proceedings invalid in any event, in this case without him there would have been no court. It has been decided that a sentence against a volunteer officer by a court composed wholly of regular officers is void, and this principle is thought to govern the present case. *McClaughry* v. *Deming*, 186 U. S. 49. On this ground the Court of Claims decided that the claimant was entitled to recover up to the time of the final muster out of his regiment on May 25, 1899, including two months' extra pay under the Act of January 12, 1899, c. 46, (30 St. 784.) 41 C. Cl. 275; ibid. 515. There are cross appeals to this Court.

The answer of the United States to the foregoing argument is that the regular officer had been granted an indefinite leave of absence from the Regular Army in order to enable him to accept a commission as Lieutenant Colonel, Second United States Volunteer Infantry, and that he was serving in the latter capacity when he sat upon the Court. It is argued that it always has been understood that under such circumstances the position in the volunteer service alone is to be regarded, that much harm will be done

if a contrary construction should be adopted now, and that the leave given to appoint regular officers to the volunteer service should be construed to carry with an appointment the same consequences that would attach to a commission if held by any one else. Act of April 22, 1898, c. 187, § 13, 30 Stat. 363. Act of May 28, 1898, c. 367, § 2, 30 Stat. 421.

This argument would have great force when it was required, as formerly, only that courts-martial for the trial of militia officers "Should be composed entirely of militia officers." Act of April 10, 1806, c. 20, art. 97, 2 Stat. 359, 371. If there was a settled practice of treating these words as satisfied if the members of the Court were militia officers, whether they also held commissions in the Regular Army or not, we well might hesitate to overthrow it. But when the express prohibition contained in Article 77 was adopted by the Revised Statutes, it made the former construction no longer possible. The words of the statute are peremptory and must be obeyed. We do not apprehend any serious consequences, in view of the date of the change. But whatever the consequences we must accept the plain meaning of plain words. It follows that the proceedings of the Court were void, and that it is not necessary to mention or consider other objections that were urged.

We are of opinion that the Court of Claims was right also in the allowances made to the claimant. In 1900 the claimant applied for an honorable discharge as of May 25, 1899, the date when his regiment was mustered out, but was refused. Of course the refusal of a certificate of honorable discharge on the ground that the applicant already has been dishonorably discharged is not an active retention of the officer in the service. The Act of March 2, 1899, c. 352, § 15, (30 Stat. 977, 981,) provided that the officers and men of the Volunteer Army should be mustered out, and under the Act of January 12, 1899, c. 46, (30 Stat. 784,) 'as far as practicable,' the discharge of officers and men was to take effect at the muster out of the organization to which they belonged. It would be monstrous to hold that it had been determined not to be practicable to discharge the claimant when his regiment was mustered out, or that the circumstances of his case, notwithstanding his technical success, afford a ground for a later claim. The claimant was allowed two months' extra pay for service outside the United States. He was not entitled to one month's extra pay for service within the United States. See Act of May 26, 1900, c. 586, 31 Stat. 205, 217. Of course, the claim for travel under the same Act (31 Stat. 210) must fail. The claimant was discharged before that Act was passed.

Judgment affirmed.

Mr. Justice MOODY did not sit and took no part in the decision.